92-885

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAY ROBERTS, individually and as Sheriff of Cambria County, and JOSEPH P. ROBERTS individually and as Commissioner of the Cambria County Board of Commissioners and Member of the Cambria County Salary Board,
Petitioners

vs.

JOHN MUTSKO, ROY PLUMMER, LOUIS BEAUJON AND EVELYN ARDINI,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Under the doctrine of qualified immunity, was it "clearly established" in 1986 that deputy sheriffs were protected from political patronage firings?

II.

By limiting the review of a public official's motion for summary judgment on qualified immunity grounds to the issue of whether a right was "clearly established", and thereby declining to review the issue of whether materials designated in the summary judgment process create a genuine issue of fact that the official violated the right, do the lower courts disregard fundamental requirements of both the doctrine of qualified immunity and the summary judgment process?

III.

Whether an order denying a motion for summary judgment on qualified immunity grounds is immediately appealable even when there are claims for injunctive relief asserted along with damage claims?

ALL PARTIES TO THE PROCEEDING

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Appellants	Appellees
COUNTY OF CAMBRIA, PENNSYLVANIA	JOHN MUTSKO
CAMBRIA COUNTY SALARY BOARD	ROY PLUMMER
JOSEPH P. ROBERTS	LOUIS BEAUJON
RON STEPHENSON	EVELYN ARDINI
T.T. METZGER, JR.	
ROBERT MCCORMICK	
THOMAS BURNS	
JAY ROBERTS	
LAUREL CREST MANOR	
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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit was filed on July 28, 1992. It is reported at 971 F.2d 1015 (3d Cir. 1992), and a copy is set forth in the within Appendix (App. 1a - 25a).

A Memorandum Opinion was delivered by the United States District Court for the Western District of Pennsylvania on June 4, 1991. It is reported at 764 F. Supp. 1031 (W.D. Pa. 1991), and a copy is set forth in the within Appendix (App. 30a - 67a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1992. The petitions for rehearing filed by both Jay Roberts and Joseph Roberts were denied on August 25, 1992.

The petition for writ of certiorari is being filed within ninety (90) days of the denial of rehearing. This Court's

jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Amendment I, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble; and to petition the government for a redress of grievances.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or

other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

HISTORY

In the Complaint, six former employees of Cambria County, Pennsylvania (Eugene Burns, John Mutsko, Roy Plummer, Ron Snyder, Louis Beaujon and Evelyn Ardini) allege that various County officials discharged them from

their respective employment positions because they either failed to support the candidacy of Jay Roberts in his 1985 campaign for Sheriff of Cambria County, or because they supported other candidates.

Burns, Mutsko, Plummer, Snyder and Beaujon were deputy sheriffs. Ardini was a paramedic and coordinator of patient transportation at Cambria County's nursing home, Laurel Crest Manor.

Jay Roberts, Eugene Burns and others were candidates in the 1985 Democratic primary election for the office of Cambria County Sheriff. Burns finished second in the open primary. Roberts placed first and was eventually elected sheriff in the general election of November, 1985.

In an effort to upgrade and professionalize the Sheriff's office, Jay Roberts stated an intention to make certain personnel changes. The County's Personnel Director, Jeffrey Saintz, obtained a legal

opinion dated November 22, 1985, advising that a sheriff has exclusive power to appoint a deputy and to revoke such an appointment pursuant to Pennsylvania statutes, 16 P.S. §§ 1203 and 1205. Afterwards, on January 2, 1986, Jay Roberts instructed the Cambria County Salary Board to take administrative action and remove Burns, Mutsko, Plummer and Snyder from the Sheriff's payroll. Upon taking office on January 6, 1986, Sheriff Roberts filed a Revocation and Appointment, by which the appointments of Burns, Mutsko, Plummer and Snyder were terminated, and appointments of certain other individuals were made. Concerning Beaujon, who was a part-time employee (called, if needed, on a per diem basis), he was not called to work at any point after Sheriff Roberts took office.

Ardini, the nursing home employee, was discharged in December, 1985 by Saintz and Wendell Davis, the Administrator at Laurel Crest Manor.

Jay Roberts was sued individually and as Sheriff of Cambria County. Joseph Roberts was sued individually and as a Cambria County Commissioner and a member of the Cambria County Salary Board. They were named in all six counts of the Complaint. Pursuant to a motion to dismiss, District Judge Donald E. Ziegler dismissed Counts II, III, V, and VI by Order and Opinion dated May 3, 1988. Count IV was dismissed as to the claims of Burns, Mutsko, Beaujon, Plummer and Snyder.

After completion of discovery, Jay Roberts and Joseph Roberts filed motions for summary judgment, contending that there is no genuine issue as to any material fact concerning the allegations of either Count I or Count IV, and thus they are entitled to summary judgment as a matter of law. Specifically, they asserted that summary judgment must be granted on Counts I and IV because the materials designated for review in the summary judgment process do not create

a genuine issue of material fact. Concerning both Count I and Count IV, Jay Roberts and Joseph Roberts asserted that they have qualified immunity from civil liability.

On June 4, 1991, District Judge Donald J. Lee entered a Memorandum Opinion and Order granting the motion for summary judgment regarding Count I as to Eugene Burns and Snyder, but denying it as to Mutsko, Plummer, Beaujon, and Ardini. The Order also granted the motion for summary judgment regarding Count IV. In the opinion, the District Judge did not find the existence of a qualified immunity defense (App. 37a - 42a).

As a result of the district court orders, only Count I remains. It alleges that Mutsko, Plummer, Beaujon and Ardini have been denied equal protection and due process of law within the meaning of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, because of an alleged conspiracy to violate their rights

of freedom of speech, association, assembly, expression and political association in retaliation for campaigning against Jay Roberts and/or not campaigning for him.

From the district court's order of June 4, 1991 denying qualified immunity, Jay Roberts and Joseph Roberts filed notices of appeal to the United States Court of Appeals for the Third Circuit. On July 28, 1992, the Court of Appeals issued an opinion dismissing the appeal of Jay Roberts, and affirming the district court order denying Joseph Roberts' motion for summary judgment on the grounds of qualified immunity (App. 1a - 25a). On August 25, 1992, the court denied rehearing as to both Jay Roberts (App. 26a - 27a) and Joseph Roberts (App. 28a - 29a).

FACTS

ROY PLUMMER

Roy Plummer testified that he had a total lack of political involvement in the campaigns of 1985; this included the fact

that he did not refuse to support Jay Roberts (Plummer Deposition, pp. 29-35). He said he was neither for nor against any candidate in those elections, and he had no personal differences with Jay Roberts (Plummer Deposition, pp. 39-40).

During his deposition, Plummer said: "I don't know what I was fired for" (Plummer Deposition, p. 33). Later, when he was asked why he was discharged in January, 1986, Plummer responded: "I don't know" (Plummer Deposition, p. 35).

Plummer, by his own admission, can neither read nor write (Plummer Deposition, pp. 4-6).

JOHN MUTSKO

In the primary election of 1985, John Mutsko said that he only passed out campaign literature; he supported no one in particular (Mutsko Deposition, pp. 41, 48). Mutsko did not campaign against anyone (Mutsko Deposition, p. 74). He was never asked to do

any election work for Jay Roberts (Mutsko Deposition, pp. 41, 49-50).

Mutsko testified that he did not know why Jay Roberts wanted to remove him as a deputy sheriff; he said he had "no idea" (Mutsko Deposition, pp. 36-37). He said he presumed Roberts didn't like him because of a meeting he (Mutsko) once had with a judge regarding prisoner transports long before Roberts became Sheriff (Mutsko Deposition, pp. 46-47). He could only say: "I feel the reason I got fired because I didn't come out openly for Jay Roberts" (Mutsko Deposition, p. 72). But, Mutsko only presumed this was the reason (Mutsko Deposition, p. 73).

Mutsko was Acting Chief Deputy. He became Acting Chief Deputy while defendant Thomas Burns was Acting Sheriff of Cambria County (Mutsko Deposition, pp. 8-9). As such, Mutsko served in a supervisory capacity; he was part of the administration of the office. Under Pennsylvania law, the

chief deputy is afforded the "full power and authority of the sheriff". 16 P.S. § 1203. Also, under state law, Mutsko has no continuing employment status. Pursuant to 16 P.S. §§ 1203 and 1205, both chief deputies and regular deputies serve "at pleasure" of the sheriff.

LOUIS BEAUJON

Louis Beaujon testified that, for a time, he campaigned for Jay Roberts with a yard sign and a car window sticker (Beaujon Deposition, pp. 100-101). He had no other political involvement in 1985 (Beaujon Deposition, pp. 107-111).

Beaujon testified that he conversed with Roberts before the general election, and Roberts told him: "I have to wait until I'm elected to get down there and see who's qualified and who isn't" (Beaujon Deposition, p. 98). He said he had no personal differences or disagreements with Roberts; they got along "ok" (Beaujon Deposition, pp.

119-120). When asked why he was not called to report on a per diem basis to work as a deputy sheriff in January, 1986 and thereafter, Beaujon responded: "I don't know" (Beaujon Deposition, p. 113).

Beaujon was never more than a part-time employee of the Sheriff's Office of Cambria County. He was included among those individuals termed "per diem" employees (Beaujon Deposition, pp. 39-40). As a "per diem", he had no guarantee of any minimum number of days or hours, and benefits were not provided. "Per diems" were paid a daily rate if and when they were called to work.

Beaujon was not formally terminated. He was not included among those deputy sheriffs whose position was revoked. He simply was not called in to work as a deputy sheriff on a per diem basis after Roberts took office (Beaujon Deposition, p. 114).

Beaujon had an extensive arrest and conviction record for disorderly conduct

offenses; he spent 18 days in jail for one of them (Beaujon Deposition, pp. 10-21). And, he had been terminated from employment as a police officer for Geistown Borough (Pennsylvania) due to "unsatisfactory performance" (Beaujon Deposition, pp. 41-42).

EVELYN ARDINI

Evelyn Ardini was an employee of Laurel Crest Manor; she was never employed in the Sheriff's office. Jay Roberts was not even Sheriff at the time of her termination; he did not take office until January, 1986, but she was terminated on December 6, 1985.

Jay Roberts had no official or unofficial capacity at Laurel Crest Manor. Joseph Roberts was one of three County Commissioners, who by virtue of that position was a member of the Salary Board.

ARGUMENT

INTRODUCTION

This case involves three important issues ripe for resolution. Two involve

splits in the circuits, and the third involves the failure to follow this Court's precedent. All three pertain to aspects of the doctrine of qualified immunity. This doctrine impacts all public officials throughout the country.

The first issue calls for this Court to resolve a split in the circuits on whether, in 1986, it was "clearly established" that a sheriff could not fire deputies for political patronage reasons. There is an urgent need for this Court to resolve the split. The inequity in some, but not all, circuits holding that public officials enjoy qualified immunity under these circumstances is patently unfair to petitioners.

The second issue calls for this Court to direct the lower courts to follow an undisputed fundamental requirement established by this Court's cases, which they ignored, to-wit, that a court reviewing a public official's motion for summary judgment

must decide whether materials designated in the summary judgment process create a "genuine issue of fact" that a right was violated and that the official violated it.

The third issue calls for this Court to resolve another split in the circuits on the issue of whether a plaintiff's claim for injunctive relief renders an order denying a public official's motion for summary judgment -- which is otherwise properly the subject of an interlocutory appeal -- unappealable. Of the ten (10) circuits which have addressed this issue, all but the Third Circuit permit interlocutory review of orders denying qualified immunity, even when equitable relief is sought.

The circuit conflicts on two issues, and the failure to follow this Court's precedent on the third issue involve exceptionally important matters in need of this Court's intervention.

I.

UNDER THE DOCTRINE OF QUALIFIED IMMUNITY, IT WAS NOT "CLEARLY ESTABLISHED" IN 1986 THAT DEPUTY SHERIFFS WERE PROTECTED FROM POLITICAL PATRONAGE FIRINGS.

As a result of the decision by the court below, there is a clear split in the circuits on this important issue.

For qualified immunity to apply, a defendant must show that his conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known". Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). Reasonableness is measured by an objective standard. Anderson v. Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). Here, there is no "clearly established" right, and the actions of Jay Roberts and Joseph Roberts were objectively reasonable. Furthermore, their conduct did not violate a constitutional right.

A.

A CONSTITUTIONAL RIGHT WAS NOT "CLEARLY ESTABLISHED".

This Court has held that the right allegedly violated must have been "clearly established" in a "particularized" way and "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right". Anderson v. Creighton, supra, 483 U.S. at 640, 107 S. Ct. at 3039. In other words, "in the light of pre-existing law," the unlawfulness of the official's conduct "must be apparent." Id. Here, the right allegedly violated by Jay Roberts and Joseph Roberts was not "clearly established" in a "particularlized" way; the "contours" were not so clear as to satisfy this standard.

That the right alleged in this case, i.e., to be protected from political patronage firings, was not clearly established in 1986 is confirmed by Upton v.

Thompson, 930 F.2d 1209 (7th Cir. 1991). Upton includes two cases which are nearly identical to the case at bar. In separate situations, former deputy sheriffs sued sheriffs, claiming First Amendment violations due to discharges which were improperly motivated by political party affiliations. In each case, the district court denied the sheriff's summary judgment on grounds of qualified immunity. However, on appeal, the court reversed, holding that the sheriffs were entitled to qualified immunity because it was not clearly established at the time of the discharges (in 1986) that the deputies were protected from patronage firings under prevailing law.

The court in Upton initially observed:

> The propriety of politically based firings of deputy sheriffs (as well as other positions) has received conflicting and confusing treatment when federal courts attempt to apply Elrod and Branti principles. In his dissent in Branti, Justice Powell predicted the problem we now confront: "The standard articulated by the court [in Branti] is framed in vague and sweeping language. Elected and

> appointed officials at all levels . . . no longer will know when political affiliation is an appropriate consideration in filling a position." 445 U.S. at 524, 100 S. Ct. at 1297-98 . . .
>
> The failure of the courts to develop and apply a consistent set of principles concerning patronage dismissals creates a context in which the Sheriffs (absent a direct holding on the issue) could have no clear understanding as to whether the deputy sheriffs had any constitutional protection from a politically based discharge. The lack of clarity on this issue, as demonstrated by the analysis below, necessarily extends the protection of qualified immunity to the Sheriffs.

930 F.2d at 1213. Quite simply, federal courts throughout the nation have not spoken clearly on the issue. In the instant case, the lack of clarity on the issue compels the conclusion that the immunity umbrella covers Jay Roberts and Joseph Roberts.

The Upton court went on to acknowledge that the Seventh Circuit "has not specifically addressed the propriety of a sheriff's dismissing a deputy for political

reasons." 930 F.2d at 1215. Reviewing its own precedent, the court said:

> . . . nonpolicy making officials were deemed subject to politically based firing because they were vested with substantial discretionary authority in the implementation of the policy goals of elected officials. The facts of these present cases suggest that a deputy sheriff helps to implement his superior's policies to the same degree as an assistant prosecutor or a deputy city commissioner, making deputies suitable for similar treatment under the First Amendment.

Id. In concluding that the position of deputy sheriff fits within the "exceptions to the prohibition on patronage firings, eroding any belief that the deputies' right to be free from political firing had been 'clearly established'", id., the court held:

> . . . it was not clearly established at the time of Upton's and Thulen's discharges that deputy sheriffs were protected from patronage firings under Elrod and Branti.

930 F.2d at 1216.

The Upton court also noted the Eleventh Circuit's decision in Terry v. Cook, 866 F.2d 373, 377 (11th Cir. 1989), which affirmed the

dismissal of claims by former deputy sheriffs that they were discharged for political reasons, holding:

> The closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention.
>
> Under the Elrod-Branti standard, loyalty to the individual sheriff and the goals and policies he seeks to implement through his office is an appropriate requirement for the effective performance of a deputy sheriff . . . . We can find no less restrictive means for meeting the needs of public service in the case of the sheriff's deputy than to acknowledge a sheriff's absolute authority of appointment and to decline to reinstate those who did not support him.

The Upton court referred to Justice Scalia's dissent in Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729, 2756-2757, 111 L. Ed. 2d 52 (1990), wherein he pointed out "the indefiniteness of the applicable Branti standard has resulted in judicial confusion and inconsistency, a confusion that has naturally transpired to

government officials having to apply Branti." 930 F.2d at 1218.

The court then concluded that "since the law was not clearly established in 1986 the sheriffs in these cases are protected by qualified immunity." Id. Concerning the time between 1986 and 1991, the Seventh Circuit further concluded:

> . . . deputy sheriffs operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies.

930 F.2d at 1218.

The Upton decision is directly on point, and its rationale and conclusions are unassailable. Accordingly, in December, 1985 and January, 1986, the law was not clearly established, and thus Sheriff Jay Roberts and Commissioner Joseph Roberts are protected by qualified immunity.

Furthermore, the Third Circuit -- prior to the case at bar -- had not specifically addressed the propriety of a deputy sheriff's

dismissal for political reasons. The court below points to Bennis v. Gable, 823 F.2d 723 (3d Cir. 1987), but that case is distinguishable. First, Bennis does not present a sufficiently similar fact situation. Second, the Bennis reasoning is grounded upon the fact that the defendant mayor who demoted the plaintiff police officers was "a reasonably active politician." 823 F.2d at 733. Here, at the time in question, Jay Roberts was a newly elected governmental official, having run for political office for the first time. Unlike the mayor in Bennis who had served a previous four year term, Robert's involvement in the terminations occurred at the very point when he initially took office. Third, the Bennis case involved police, not deputy sheriffs, and there was no state statute covering the police employees similar to the Pennsylvania law pertaining to deputy sheriffs. Fourth, the employers in Bennis had not sought a

legal opinion prior to taking action involving their employees; here, before acting, Roberts obtained a written opinion from counsel.

More recently, the Sixth Circuit in Cagle v. Gilley, 957 F.2d 1347 (6th Cir. 1992), also held that a sheriff was entitled to qualified immunity in a civil rights action brought by former deputies who alleged a First Amendment violation by the sheriff's failure to rehire them due to their support of an election opponent. The Cagle court, referring to Upton, noted that "the law today remains unsettled among the circuits on the question". 957 F.2d at 1349. The Cagle court went on to point out that Upton and Terry held that a sheriff may use political considerations when determining who may serve as a deputy sheriff. Noting that Jones v. Dodson, 727 F.2d 1329, 1338 (4th Cir. 1984), and Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1991), hold to the contrary, the Cagle

court then concluded that this split in the circuits,

> . . . indicates that the deputy sheriff's rights in this regard are currently unsettled as a matter of constitutional law. Therefore, those rights were not clearly established in August and September, 1988 when the deputies in the instant case were not reappointed . . .

957 F.2d at 1349.

In sum, the Sixth, Seventh and Eleventh Circuits have found that a sheriff has qualified immunity in these circumstances. On the basis of their reasoning and holdings, a right of deputy sheriffs to be protected from political patronage firings was not "clearly established" in December, 1985 and January, 1986, and Sheriff Jay Roberts and Commissioner Joseph Roberts are protected by qualified immunity.

B.

THE SHERIFF'S ACTIONS WERE OBJECTIVELY REASONABLE.

Anderson v. Creighton, supra, teaches that the question of whether an official's

actions were objectively reasonable requires examination of the information available to the official. 483 U.S. at 641, 107 S. Ct. at 3039. In the instant matter, such an examination reveals that the actions of Jay Roberts and Joseph Roberts were -- without doubt -- objectively reasonable. The lower court's contrary ruling misapprehends the Anderson standard.

It is undisputed that in Pennsylvania, by virtue of legislative enactment, a county sheriff has the power to appoint a deputy and to revoke such an appointment "at pleasure". Specifically, 16 P.S. § 1203 provides:

> The sheriff of each county shall appoint by commission duly recorded in the office for recording deeds, a chief deputy, whose appointment shall be revocable at pleasure on recording in said office a signed revocation thereof . . . (emphasis added)

16 P.S. 1205 provides:

> The sheriff of each county may appoint such deputies and clerks as may be necessary to properly transact the business of his office. He may revoke the appointment of deputies in the same manner as his chief deputy . . . (emphasis added)

Here, the deputy sheriffs -- Mutsko and Plummer -- were not reappointed by Sheriff Roberts. As to Beaujon, he was not summoned to work on a per diem basis. Due to the clear statutory language of 16 P.S. §§ 1203 and 1205, Sheriff Roberts' action was a proper exercise of his legal authority.

Based on the Harlow and Anderson standards, Roberts could not reasonably have been expected to know at the time he did not reappoint the deputies that such an action could be violative of the law, since Pennsylvania law pertaining to county sheriffs is plain in affording him the power to hire and fire at will.

It is further undisputed that prior to taking office, Jay Roberts requested a legal opinion from the Cambria County Personnel Office concerning his rights to "hire and fire". The attorneys, who were specially employed by the County for advice and counsel concerning governmental matters, provided a

written, legal opinion to the Personnel Office in response to Sheriff Roberts request; this opinion is dated November 22, 1985, and signed by an attorney, and sets forth in part:

> Pursuant to your request regarding the power of elected officials to appoint and terminate employees in their respective offices, please be advised as follows: the Sheriff has unique powers which are specifically conferred upon him by the County Code section 1203. Pursuant to Section 1203 of the County Code, the Sheriff of each County shall appoint by commission duly recorded in the Office for Recording Deeds, a Chief Deputy who's appointment shall be revocable by the Sheriff at his pleasure on recording in said office a signed revocation thereof.
>
> Accordingly, as to the Chief Deputy, the sheriff may remove him from office merely by recording a revocation in the Recorder of Deeds Office. The County Code further provides (16 Purdon's Statutes 1205) that the Sheriff of each County may appoint such other deputies and clerks in the same manner as applicable to his Chief Deputy. In accordance with this provision, the other deputies and the clerks in the office may be removed by revocation of appointment filed in the Recorder of Deeds Office under the Sheriff's signature.[1]

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1 While counsel's opinion may not discuss every possible issue,

(Footnote 1 Continued On Next Page)

Thus, not only did Sheriff-Elect Roberts have the plain language of the statute, but he had the plain language of a legal opinion advising that he could appoint those who he wished and not reappoint others at will.

Even though the Pennsylvania statutes are clear, Sheriff-Elect Roberts sought the advice of counsel before taking any action. Counsel told him he was free to appoint or revoke, as he saw fit. Accordingly, he acted in good faith, and no reasonable jury could find that his actions were so apparently unlawful that his claim of qualified immunity can be denied. See Lee v. Mihalich, 847 F.2d 66 (3d Cir. 1988); Bier v. Fleming, 717 F.2d 308, 313 (6th Cir. 1983); Wentz v. Klecker, 721 F.2d 244, 247 (8th Cir. 1983);

(Footnote 1 Continued From Previous Page) constitutional or otherwise, it is additional proof of the fact that Jay Roberts had an objectively reasonable basis to act. If the legal opinion is incomplete, knowledge of what it does not include cannot be attributed to Roberts.

and Tubbesing v. Arnold, 742 F.2d 401, 407 (8th Cir. 1984).

Sheriff-Elect Roberts had not served previously as a sheriff or in any other official capacity. Nor is he a lawyer. Having read the Pennsylvania statutes and sought the advice of counsel who assured him of the legality of his actions, he could not then reasonably be expected to know that any law may have prohibited those actions.

This Court has said that qualified immunity shields "all but the plainly incompetent or those who knowingly violate the law", and if "officers of reasonable competence could disagree on [an] issue, immunity should be recognized". Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986). Here, "reasonable competence" is not in question, and there is no evidence of a knowing violation of law. Therefore, as Malley makes clear, the officials are protected.

In short, Jay Roberts -- and in turn Joseph Roberts -- certainly were objectively reasonable in handling this situation. Thus, qualified immunity applies. Anderson v. Creighton, supra, 483 U.S. at 646.

C.

THE DEPUTY SHERIFF POSITION IS CONFIDENTIAL AND PARTY AFFILIATION IS AN APPROPRIATE REQUIREMENT, THUS, NON-REAPPOINTMENTS DO NOT INFRINGE FIRST AMENDMENT RIGHTS.

Implicit in the statutory mandate of 16 P.S. §§ 1203 and 1205 is the legislative recognition that deputy sheriff positions are in fact confidential. The legislature has decided to permit the sheriff to appoint or revoke an appointment at will. These statutes allow the sheriff to determine what is an appropriate requirement for the effective functioning of his office, and certainly party affiliation and party faction are legitimate considerations.

In other words, these statutes are themselves a demonstration that the

legislature has found that party affiliation and party faction may be taken into account by a county sheriff in operating his office, which includes the appointment of deputies. Moreover, it is an undisputed fact that deputy sheriffs are constantly in possession of confidential information. Specific examples include transportation of prisoners and various aspects of courthouse and courtroom procedure. This is especially true when a particular deputy sheriff is assigned to the courtroom of a particular judge for security reasons.

It would be ludicrous to argue that deputy sheriffs are not in a confidential position. Imagine a judge's staff member making such an argument. Likewise, a deputy who works hand in hand with a judge and/or a member of the judge's staff is in a "confidential" position.

In Balogh v. Charron, 666 F. Supp. 987 (E.D. Mich. 1987), the district court held

that a court officer, who was in close contact with a judge and had access to confidential communications and records, could be discharged for political reasons. The court reasoned:

> Political patronage discharges are an exception to the prohibition against the discharge of a public employee for the exercise of First Amendment rights. Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980). The political patronage exception was first recognized in Elrod, supra. The Supreme Court stated that public employees who are either confidential employees or who work in policy making positions are not protected by the First Amendment against a politically motivated discharge. 427 U.S. at 367-72, 96 S. Ct. at 2687-89. In Branti v. Finkel, supra, the Supreme Court stated that the inquiry should instead be whether political concerns are an appropriate requirement for the office involved. 445 U.S. at 518, 100 S. Ct. at 1295. Although no longer a clear test of whether the political patronage exception applies, an employee's confidential status may be a consideration in determining whether political concerns are a valid requirement. Meeks v. Grimes, 779 F.2d 417, 420 (7th Cir. 1985).

666 F. Supp. at 988. The court then concluded that the plaintiff court officer was such a confidential employee:

> Access to such confidential information, combined with the court officer's duty to protect the judge, allows political concerns to be a legitimate requirement for the position. . . . Under Branti, supra, the discharge here falls within the political patronage exception. Plaintiff is also a confidential employee who could create a security problem either through a leak of confidential information or by inefficient protection of defendant. Accordingly, the state's interest in promoting efficient public service outweighs plaintiff's First Amendment rights. Donlin v. Watkins, 814 F.2d 273 (6th Cir. 1987). It is not necessary to wait until the office is actually disrupted before taking action. Connick v. Myers, 461 U.S. 138, 151-52, 103 S. Ct. 1684, 1692-93, 75 L. Ed. 2d 708 (1983).

In the instant matter, deputy sheriffs have close contact with judges, the district attorney's office and various prison wardens. They necessarily have access to confidential communications and records, especially with regard to security for both courthouse personnel and prisoners who they transport.

Thus, they are confidential employees, and the governmental interest in "promoting efficient public service outweighs plaintiff's First Amendment rights".

On appeal, Balogh v. Charron, 885 F.2d 356 (6th Cir. 1988), was affirmed by the United States Court of Appeals for the Sixth Circuit. The court held:

> We agree . . . that the bailiff to the judge, like an administrative or legislative aide to a legislator, is a confidential employee. As a judicial aide, his confidential relationship arises because he handles sensitive communications for the judge, acts as his body guard and may discuss and learn about the out-come of cases pending before the judge before the decision is announced to the public.

Id. The court went on to say that the determination of "confidentiality" is done by an objective standard, depending on the function of the job:

> Judicial aides who work in chambers and are assigned to one judge as court officer, body guard and general assistant normally handle sensitive information about cases of a confidential nature, information which is not public information. Judges must be able to rely on the confidentiality

> of their relationship with such aides . . .

855 F.2d at 356-57. Here, likewise, deputy sheriffs are constantly handling sensitive information about cases and matters of individual judicial and courthouse security. The sheriff must be able to rely on the confidentiality of his relationship with these deputies.

It is also important to recognize that in a small county, like Cambria County, Pennsylvania, the need for confidence in one's employees is heightened since an official must rely on only a small staff to carry out his office's objectives. This is even more apparent in law enforcement where sheriffs deputies are often called upon to make on the spot, split-second decisions. If a sheriff in a small county is not assured of the loyalty of his staff of deputies, the ability of his office to effectively perform its duties will be severally hampered. Moreover, should an open rift ever develop

between a sheriff and one or more of his deputies, the office could become nothing more than a "battle ground in which little was accomplished to the detriment of the citizens . . . ". Newcomb v. Brennan, 558 F.2d 825, 830 (7th Cir. 1977).

In an analogous situation, the court in Owens v. Rush, 654 F.2d 1370, 1376 (10th Cir. 1981), noted that where employees serve at the pleasure of a public official, a high level of personal accountability to the official can be presumed.

A high level of personal accountability is "consistent with the highly sensitive and confidential nature of the work which deputies perform as well as with the considerable powers of the deputy to represent the [official] . . . in the eyes of the public". Ramirez v. San Mateo County, 639 F.2d 509, 513 (9th Cir. 1981). Thus, a high level of accountability, equates with the confidential relationship of a sheriff

deputy's employment. Such accountability is even greater in a small county, like Cambria County, where only a few deputies are employed to account to the sheriff and represent him in public.

Furthermore, a sheriff depends on his deputies to carry out policy. As the court observed in Upton:

> A deputy sheriff, in implementing the Sheriff's basic policy, will "make some decisions that will actually create policy." . . . [D]eputies on patrol or other assignment frequently work autonomously, giving them wide latitude and discretion in the performance of their duties and in the implementation of department goals. In order to promote public confidence in law enforcement, the Sheriff depends on his deputies to publicly project his competence and the competence of the office. Deputies are also expected to provide the Sheriff with truthful, accurate and beneficial information which he needs to make decisions and administer his office. (citation omitted)

930 F.2d at 1215. Accordingly, in light of the deputies' confidential status as well as a sheriff's dependence on his deputies for

political survival, political affiliation is a valid requirement.

II.

BY LIMITING THE REVIEW OF A PUBLIC OFFICIAL'S MOTION FOR SUMMARY JUDGMENT ON QUALIFIED IMMUNITY GROUNDS TO THE ISSUE OF WHETHER A RIGHT WAS "CLEARLY ESTABLISHED", AND THEREBY DECLINING TO REVIEW THE ISSUE OF WHETHER MATERIALS DESIGNATED IN THE SUMMARY JUDGMENT PROCESS CREATE A GENUINE ISSUE OF FACT THAT THE OFFICIAL VIOLATED THE RIGHT, THE LOWER COURTS DISREGARD FUNDAMENTAL REQUIREMENTS OF BOTH THE DOCTRINE OF QUALIFIED IMMUNITY AND THE SUMMARY JUDGMENT PROCESS.

When a public official who has been named as a defendant in a civil rights action files a motion for summary judgment, raising the doctrine of qualified immunity as a bar to further proceedings, the official contends that the materials designated in the summary judgment process do not create a genuine issue of material fact that the official violated a clearly established right. Judicial review of this contention has three component questions:

1. whether the designated materials create a genuine issue of fact that a right was violated?
2. whether the designated materials create a genuine issue of fact that the official violated the right? and,
3. whether the right was clearly established at the time of the alleged violation?

A "no" answer to any of these questions entitles the official to summary judgment.

In this case, Jay Roberts and Joseph Roberts contend that "no" answers to all three questions entitle them to summary judgment.[2] But in reviewing the motions for

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2 As this case involves four plaintiffs claiming political discrimination, the public officials' specific contentions are:

1. that the designated materials do not create a genuine issue of fact that a plaintiff's political activity was a "substantial factor" supporting the decision to terminate his employment, Mt.

(Footnote 2 Continued on Next Page)

summary judgment, the district court and the court of appeals consider only the third question, i.e., whether the right in question was clearly established. By declining to review the first and second questions, the lower courts commit fundamental error.

A.

Rule 56 of the Federal Rules of Civil Procedure and a "trilogy" of this Court's cases[3] establish the standards and procedures

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(Footnote 2 Continued From Previous Page)
Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977);

2. that the designated materials do not create a genuine issue of fact that a particular official participated in the decision to terminate a particular plaintiff; and

3. for the three plaintiffs who were once deputy sheriffs, that their right to be free from termination for political reasons was not clearly established when their employment was terminated.

3 Celotex Corp v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505,
(Footnote 3 Continued On Next Page)

for judicial review of a motion for summary judgment. As Rule 56 and these cases apply to the instant matter, they establish a) that a reviewing court may not rely on the allegations in the adverse, non-moving party's pleading(s) to create a "genuine issue of material fact", and b) that, in finding a "genuine issue of fact", a reviewing court may rely only on materials designated in the summary judgment process.

Rule 56(e) provides:

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

In Celotex, the Court confirms that Rule 56(e)

(Footnote 3 Continued From Previous Page) 91 L. Ed. 2d 202 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

> requires the non-moving party to go beyond the pleading and by [its] own affidavits or by the "depositions, answers to interrogatories and admissions on file", designate "specific facts showing that there is a genuine issue [of material fact] for trial."

Id., 91 L. Ed. 2d at 274.

Here, in response to the motions for summary judgment, the plaintiffs failed to designate any such materials. That omission, in and of itself, entitles Jay Roberts and Joseph Roberts to summary judgment. But in its review of the motions for summary judgment, the district court compounds the error by not reviewing the issue of whether any such materials create a genuine issue of fact a) that a right was violated, and b) that individual official-defendants violated that right. The court of appeals "follows suit" and declines to review this issue. As its excuse for not reviewing it, the court of appeals mistakenly treats the issue as an instance of what it calls -- citing Chinchello v. Fenton, 805 F.2d 126 (3d Cir.

1986) -- the "I didn't do it" defense. (App. 8a - 9a). By the "I didn't do it" defense, the court of appeals refers to a case in which a) a plaintiff's designated materials show that an official violated a right, and b) the official's designated materials contradict the plaintiff's materials by showing that the right was not violated and/or that he did not violate it. In such a case, summary judgment is legally incorrect; under such facts, there is a "genuine issue of material fact", and the case is ideally suited for trial and the trial procedures which test credibility. But here, by their motions for summary judgment and by the appeal from the order denying summary judgment, Sheriff Roberts and Commissioner Roberts are not asserting the "I didn't do it" defense. Instead, they are simply asserting, as components of their qualified immunity claims, 1) that any designated materials do not create a issue of material

fact that a right was violated; 2) that any designated materials do not create a issue of fact that a particular official violated the right; and, 3) that the right was not clearly established at the time of the alleged violation.

Each of these three assertions forms a legally mandated basis for summary judgment. Reviewing courts may not "duck" any of them, but in this case, they "ducked" two of three.

B.

The doctrine of qualified immunity also establishes that, when an official/defendant files a motion for summary judgment raising the doctrine of qualified immunity as a bar to further proceedings, courts are bound to review not just the issue of whether the right in question was clearly established at the time of the alleged violation, but also the issue of whether designated materials create a genuine issue a) that a right was

violated, and b) that the official violated it.

> Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411, 425 (1985). Also see Harlow v. Fitzgerald, supra; Anderson v. Creighton, supra; Siegert v. Gilley, ____ U.S. ____, 111 S. Ct. 1789, 114 L. Ed. 2d 277, 287 (1991) ("A necessary concomitant to the determination of whether a constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted the violation of a constitutional right at all.").

Also see, e.g., Brown v. Grabowski, 922 F.2d 1097, 1109-1111 (3d Cir. 1990);[4] Unwin v. Campbell, 863 F.2d 124, 130-3 (1st Cir.

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4 At oral argument in the court of appeals, the panel suggested that its review was limited to the issue of whether the right in question was "clearly established." Following oral argument, undersigned counsel submitted a letter to the court of appeals, directing its attention to its own case, Brown v. Grabowski, supra, in which the court of appeals squarely holds that -- upon interlocutory appellate review of an order denying a motion for summary judgment on qualified immunity grounds -- the matters which are subject to review are not limited to the issue of whether the right which is alleged to have been violated was "a clearly established right of which a reasonable person would have known". Instead, if the defendant/appellant raises it, the Court must also review the issue of whether the materials designated by the plaintiff create a genuine issue of material fact that the defendant violated the right in question.

Nevertheless, the opinion of the court of appeals confirms that it does not address this issue. Thereafter, by their petitions for rehearing, Jay Roberts and Joseph Roberts again directed the court to the binding effect of its own case. But the court responded by denying the petition without explanation.

1988); Turner v. Dammon, 848 F.2d 440, 444 (4th Cir. 1988); Geter v. Fortenberry, 849 F.2d 1550, 1559-60 (5th Cir. 1988); Poe v. Haydon, 853 F.2d 418, 425 (6th Cir. 1988); Green v. Carlson, 826 F.2d 647, 650-2 (7th Cir. 1987); Trapnell v. Ralston, 819 F.2d 182, 184, n. 1 (8th Cir. 1987); Myers v. Morris, 810 F.2d 1437, 1458-9 (8th Cir.), cert. denied 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 50 (1987); White by White v. Pierce County, 797 F.2d 812, 814-5 (9th Cir. 1986); DeVargas v. Mason & Hanger-Silas Mason Co. Inc., 844 F.2d 714, 718-9 (10th Cir. 1988); Stewart v. Baldwin County Board of Education, 908 F.2d 1499, 1503 (11th Cir. 1990).

C.

In summary, by declining to review the qualified immunity issue of whether materials designated in the summary judgment process create a genuine issue of fact that a right was violated and that a particular official violated it, the court of appeals a) decides

a federal question in a way that conflicts with this Court's decisions in Mitchell, Anderson, Siegert, and Celotex; b) renders a decision in conflict with another decision of the same court of appeals, i.e., Brown v. Grabowski; c) renders a decision in conflict with all other courts of appeals on the same matter; d) renders a decision in conflict with Rule 56 of the Federal Rules of Civil Procedure; and e) so far departs from the accepted and usual course of judicial proceedings, and so far sanctions such a departure by the district court, as to call for an exercise of this Court's power of supervision.

III.

AN ORDER DENYING A MOTION FOR SUMMARY JUDGMENT ON QUALIFIED IMMUNITY GROUNDS IS IMMEDIATELY APPEALABLE EVEN WHEN THERE ARE CLAIMS FOR INJUNCTIVE RELIEF ASSERTED ALONG WITH DAMAGE CLAIMS.

While the court of appeals acknowledged that Sheriff Jay Roberts and Commissioner Joseph Roberts properly raised the qualified

immunity issue in the district court, the court decided that it did not have appellate jurisdiction to review the denial of Jay Roberts qualified immunity defense. (App a). This decision was based on Prisco v. U.S. Dept. of Justice, 851 F.2d 93 (3d Cir. 1988), cert. denied, 490 U.S. 1089 (1989), which held that the denial of a motion for summary judgment on grounds of qualified immunity is not appealable where a claim for prospective injunctive relief, as well as damages, is pending.[5]

The nine (9) other circuits which have considered this issue have reached the

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5 However, the circuit court below declared its "dissatisfaction" with the Prisco holding:

> Despite our own dissatisfaction with the Prisco rule, as a panel of three judges we are bound to follow our circuit's precedent . . . A recent opinion from this court voiced similar concerns, but also felt bound to apply Prisco. See Schrob v. Catterson, No. 91-5669, 1992 U.S. App. LEXIS 14660, at *35-45 (3d Cir. June 29, 1992).

opposite conclusion, and hold that the collateral order doctrine entitles officials to interlocutory review of denials of immunity, even though claims for equitable relief are joined with damage claims. See De Vargas v. Mason & Hanger-Silas Mason Co., supra, 844 F.2d at 717-20; Young v. Lynch, 846 F.2d 960, 961 (4th Cir. 1988); Drake v. Scott, 812 F.2d 395, 398 (8th Cir.), cert. denied, 484 U.S. 965, 108 S. Ct. 455, 98 L. Ed 2d 395 (1987); Scott v. Lacy, 811 F.2d 1153, 1153-54 (7th Cir. 1987); De Abadia v. Izquierdo Mora, 792 F.2d 1187, 1190 (1st Cir. 1986); Kennedy v. City of Cleveland, 797 F.2d 297, 305-06 (6th Cir.), cert. denied, 479 U.S. 1103, 107 S. Ct. 1334, 94 L. Ed. 2d 185 (1987); Marx v. Gumbinner, 855 F.2d 783, 787-88 (11th Cir. 1988); DiMartini v. Ferrin, 889 F.2d 922 (9th Cir. 1989); Giacalone v. Abrams, 850 F.2d 79, 84 (2d Cir. 1988).

As the Eleventh Circuit explained in Marx v. Gumbinner, supra, 855 F.2d at 787-788:

> The problem with the Third Circuit's view is that it fails to take into account the difference, from a government official's perspective, between having to stand trial on a claim for injunctive relief and having to stand trial on a claim for money damages. In the first instance,the defendant, if he loses the suit, will simply be ordered by the court to do something, at the state's expense, in his official capacity. In the second instance, in contrast, the losing defendant will be liable in his personal capacity for a monetary payment of some amount; even if he ultimately prevails in an appeal from final judgment, his personal assets will be subject to attachment pending the appeal unless he posts, at his own expense, a supersedeas bond. Obviously, compared to the threat of exposure to the first kind of suit, the threat of exposure to the second kind of suit is much more likely to have the effect of dampening the ardor with which the individual carries out his official functions.
>
> Our point is that the entitlement to be free from suit on a claim for money damages is, in the context of a suit against a government official, conceptually distinct from an entitlement to be free from suit on a claim for injunctive relief. Once that observation is accepted, the rationale underlying the Third Circuit's rule breaks down. Simply put, even if the

> defendant will be subject to suit on a claim for injunctive relief, the policy reasons for according the government official immunity to suit for money damages -- and hence the reasons for allowing an immediate appeal if that immunity is denied -- remain. We hold, therefore, that the pending claim for injunctive relief does not prevent us from entertaining the defendants' appeal.

See also DiMartini v. Ferrin, supra, 889 F.2d at 925:

> Denying the official interlocutory review denies him or her the right to avoid trial, and prolongs the pressures of having his or her personal finances at risk. See Prisco, 851 F.2d at 95 ("the policy rationale for qualified immunity is that we do not want officials to make discretionary decisions with one wary eye on their pocketbook"). Because the issue of immunity is irrelevant to a district court's consideration of equitable claims, the inclusion of such claims should not affect the extent to which the immunity determination is either conclusive or collateral.

Concerning a defendant who is no longer a government official, the panel in Prisco held that an order denying a motion for summary judgment on grounds of qualified

immunity in a civil rights action is appealable, even though injunctive relief is sought. 851 F.2d at 96. Here, Joseph Roberts is no longer a Cambria County Commissioner, and thus the court of appeals decided it had jurisdiction over his appeal. Jay Roberts, who is the presently elected Sheriff of Cambria County, is bound by the court's decision on the merits of Joseph Roberts' appeal.

For the reasons advanced by the nine other circuits deciding the question, the conflict created by the Third Circuit should be resolved by a decision in conformity with that of the other courts.

CONCLUSION

Based upon the reasons stated above and the record as a whole, a writ of certiorari

should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
Dennis J. Clark
Counsel for Petitioner
Jay Roberts and
Counsel of Record

Thomas Livingston
Counsel for Petitioner
Joseph Roberts

APPENDIX

APPENDIX A

Filed July 28, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-3351, 91-3352,
91-3374 and 91-3377

EUGENE BURNS; JOHN MUTSKO; ROY PLUMMER; LOUIS BEAUJON; RON SNYDER and EVELYN ARDINI

v.

COUNTY OF CAMBRIA, PENNSYLVANIA; CAMBRIA COUNTY SALARY BOARD; JOSEPH P. ROBERTS; RON STEPHENSON and T.T. METZGER, JR., individually and as Commissioners of the Cambria County Board of Commissioners and Members of the Cambria County Salary Board; ROBERT McCORMICK, individually and as Cambria County Controller and Member of the Cambria County Salary Board; THOMAS BURNS, individually and as Acting Sheriff and Member of the Salary Board of Cambria County; JAY ROBERTS, individually and as Sheriff of Cambria County; LAUREL CREST MANOR; WENDELL P. DAVIS, individually and as Administrator of Laurel Crest Manor; and JEFFREY SAINTZ, individually and as the Personnel Director of Cambria County

Jay Roberts, individually and as Sheriff of Cambria County,

Appellant in No. 91-3351

Joseph P. Roberts, individually and as Commissioner of the Cambria County Board of Commissioners, and as a Member of the Cambria County Salary Board

Appellant in No. 91-3352

County of Cambria; Cambria County Salary Board; Ron Stephenson; T.T. Metzger, Jr.; the Cambria County Board of Commissioners, Robert McCormick; the Cambria County Controller; Laurel Crest Manor

Appellants in No. 91-3374

Thomas Burns, individually and as Acting Sheriff and member of the Salary Board of Cambria County,

Appellant in No. 91-3377

Appeal from the United States District Court
for the Western District Court of Pennsylvania
(D.C. Civil No. 87-02606)

Argued February 27, 1992

Before: SLOVITER, *Chief Judge*, SCIRICA and NYGAARD, *Circuit Judges*

(Filed July 28, 1992)

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Ron Stephenson, T.T. Metzger, Jr.,
Cambria County Board of Commissioners,
Robert McCormick, Cambria County
Controller, Laurel Crest Manor and Jeffrey
Saintz, Personnel Director,
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OPINION OF THE COURT

SLOVITER, *Chief Judge*.

This appeal presents the question whether county officials have qualified immunity against claims by deputy sheriffs and a state-employed paramedic who allege they were dismissed by the officials solely for their political activity in violation of their rights under the First Amendment. The defendants' motion for summary judgment on the grounds, *inter alia*, of qualified immunity, was denied by the district court. On interlocutory review of the district court's order, we address only the issue of qualified immunity.

I.

Facts

Defendant Jay Roberts was elected Sheriff of Cambria County, Pennsylvania, in December 1985. It is undisputed that on January 2, 1986, the Cambria County Salary Board, which consisted of defendants County Commissioners Joseph Roberts, Ron Stephenson, T.T. Metzger, Jr., County Controller Robert McCormick, and former Acting Sheriff Thomas Burns, voted to remove deputy sheriffs Eugene Burns, John Mutsko and Roy Plummer from the payroll of Cambria County, along with Ron Snyder, a clerk-investigator in the

County Public Defender's Office, at the direction of Sheriff-elect Roberts.[1] Upon taking office on January 6, 1986, Sheriff Roberts officially revoked their employment and did not call plaintiff Beaujon, who was a part-time, per diem, employee of the sheriff's office, to work again. Plaintiff Evelyn Ardini was fired in December 1985, by defendants Wendell Davis and Jeffrey Saintz from her job as a paramedic and coordinator of patient transportation for Laurel Crest Manor, a Cambria County Agency.

The plaintiffs alleged in their complaint that the dismissals were in retaliation for their failure to support Jay Roberts in the sheriff's election and/or their support of candidates who opposed him. Ardini, whose supervisor, William Tomallo, also ran against Jay Roberts in the election, testified in deposition that she was asked by Jay Roberts and his father Joseph Roberts to give them a list of the persons who telephoned Tomallo so they could know who Tomallo's political backers were, and when she didn't come up with the list she was fired. The plaintiffs seek, *inter alia*, compensatory damages, punitive damages, and reinstatement.

The district court initially dismissed Counts II, III, and VI of the complaint.[2] On June 4, 1991, the district court granted summary judgment to

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1. The district court's opinion states that there was a unanimous vote by the Salary Board Members. The appellate briefs of several defendants contend they were not present. That factual issue is not material to the matter before us.

2. The court held that these counts, which alleged violations of 42 U.S.C. §§ 1985(2), (3), 1986, and state law defamation, did not state a claim.

all of the defendants as to Counts IV and V.[3] It also granted summary judgment for defendants against plaintiffs Snyder and Eugene Burns on all counts.[4]

At the same time, the court denied the defendants' motion for summary judgment as to the remaining plaintiffs' claim that the defendants had violated their rights under the First Amendment. *Burns v. County of Cambria*, 764 F. Supp. 1031 (W.D. Pa. 1991). The court found that the right of public employees not to be discharged in retaliation for exercising their rights under the First Amendment was clearly established. *Id.* at 1036. The court found that there was a material issue of fact as to whether the plaintiffs' political activities were substantial or motivating factors for their discharge. *Id.* at 1037. Finally, in considering the qualified immunity defense of the two Roberts defendants, the court held that they were not entitled to qualified immunity as a matter of law. *Id.*

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3. Count IV contained Ardini's claim of a procedural due process violation in connection with her dismissal. The district court held that Ardini, as an at-will employee under state law, had no property right in her employment. Count V contained Ardini's claim of sex discrimination. The court held there was no supporting evidence.

4. The court held, *inter alia*, that Snyder, who had a criminal record, was disqualified under state law from holding the position of deputy sheriff, and that Eugene Burns, who himself ran for Sheriff against Jay Roberts, could have reasonably been viewed as a threat to the proper operation of the Sheriff's office for that reason. Neither of these plaintiffs is before us on this appeal.

II.

Appellate Jurisdiction

A.

Preservation of Issue in the District Court

Defendants Jay Roberts, Joseph Roberts, Thomas Burns, Ron Stephenson, T.T. Metzger, Jr., Robert McCormick, and Jeffrey Saintz have appealed the denial of summary judgment. We consider first the extent to which we can hear their appeal. Under the authority of *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the denial of summary judgment on grounds of qualified immunity is appealable under the collateral order doctrine. However, we have held that we will review a claim of qualified immunity only if it was raised in the district court. *See Brown v. United States*, 851 F.2d 615, 620 (3d Cir. 1988) (it would be "within our power . . .[but] inappropriate" to address the issue of qualified immunity if the district court has not addressed it "even if the record provided a sufficient basis for its resolution"); *see also Chinchello v. Fenton*, 805 F.2d 126, 130 (3d Cir. 1986).

It is clear from the record that both Sheriff Jay Roberts and Commissioner Joseph Roberts raised the issue of qualified immunity as a basis for their motions for summary judgment. There is no evidence, however, that any of the other defendants did. The defendants claim that they incorporated the Roberts's qualified immunity defense into their own motions for summary judgment at oral argument in May 1990, but fail to point to any particular place in the record to substantiate that claim. Significantly, in a

memorandum order continuing the trial pending the interlocutory appeal of the two Roberts defendants, the district court specifically stated that the other defendants had not raised qualified immunity in connection with their summary judgment motions. The court stated "that neither the notes of the Court nor its law clerk, present at argument on the motions, include any such incorporation." App. at 117. The defendants have offered nothing to contradict the district court's finding that such incorporation never took place. Our independent review of the record has also failed to locate any motion or incorporation of qualified immunity by these other defendants.

In an attempt to salvage their appeal, these defendants direct us to other defenses they raised in support of their summary judgment motions. For example, in Burns's motion he argued that the Sheriff had the sole statutory right to revoke the appointments of plaintiffs; Burns also argued that there is no evidence to establish that he engaged in conduct that deprived anyone of rights, privileges, or immunities secured by the Constitution or laws of the United States. Similarly, the other defendants claimed that each of them was powerless to terminate sheriff's deputies.

In order to determine whether these assertions constituted a defense of qualified immunity, we must decide whether defendants were simply "attempt[ing] to show only that [they] did not engage in the conduct of which [the] plaintiff[s] complain[]," *Chinchello*, 805 F.2d at 131 (also known as the "I didn't do it" defense), or whether defendants "can accurately be described as [contending] that [they] violated no clearly

established legal norm." *Id.* Unlike in *Chinchello*, where the defendant based his summary judgment motion on the "legal proposition that the alleged failure to adequately train . . . even if true, did not constitute a breach of clearly established legal norms," *id.*, the claims by the non-Roberts defendants were that they were not responsible for firing the plaintiffs. They did not claim that even if they had fired the plaintiffs, that action would not have violated the plaintiffs' clearly established constitutional rights. Only the latter contention would have invoked the qualified immunity defense. The former statement is simply the "I didn't do it" defense and therefore not cognizable as an assertion of qualified immunity.

Consistent with our prior prudential rulings, we decline to exercise jurisdiction over the appeals of defendants Stephenson, Metzger, McCormick, Burns, and Saintz. We note in passing, however, that the qualified immunity claim of these defendants would not differ in substance from that which we do address hereafter.

B.

The Effect of Prisco

There is one other preliminary matter. The rationale for the Supreme Court's holding in *Mitchell* on the appealability of an order denying a motion for summary judgment on the grounds of qualified immunity was that qualified immunity provides protection not only against liability for money damages but also against standing trial. 472 U.S. at 524-30. The Court left open the question whether the denial of qualified immunity is also an appealable collateral order when the

plaintiff states a claim not only for damages but also for injunctive relief. *Id.* at 519 n.5.

In *Prisco v. U.S. Dept. of Justice*, 851 F.2d 93 (3d Cir. 1988), *cert. denied*, 490 U.S. 1089 (1989), this court held that because qualified immunity does not apply to claims for prospective relief, the denial of a motion for summary judgment based on qualified immunity was not appealable as an interlocutory order when the plaintiffs assert a claim for prospective relief. We explained that

> [t]he marginal benefit to a governmental official from an interlocutory review of a ruling that proof of damages should not be heard is so slight that it cannot outweigh the systemic harms from permitting piecemeal interlocutory review of discrete issues in a case which, even against that official, will be ongoing.

Id. at 96. However, we entertained the appeal of one defendant in *Prisco* who was no longer a public official because the requested injunctive and declaratory relief did not apply to him, and thus decided the relevant issues.

The parties in this case did not raise the *Prisco* issue, but we must review our own jurisdiction. Therefore, we directed the parties to submit letter briefs addressing the effect of *Prisco* on our ability to review the appellants' claims.

Commissioner Roberts correctly points out that nine other circuits have disagreed with our analysis in *Prisco* and have allowed interlocutory appeals from denials of summary judgment on the qualified immunity defense even when the plaintiffs requested injunctive relief as well as damages. For example, in *Scott v. Lacy*, 811 F.2d 1153-54 (7th Cir. 1987) (per curiam), the court

relied on the rationale behind *Mitchell* to allow an appeal of a qualified immunity defense when injunctive relief was still pending. The court stated that

> [a]s a practical matter, a public official who is a defendant in a suit seeking an injunction is not "on trial" at all. The suit seeks relief against him in his official capacity; he need not attend the trial . . . . If he leaves office during the interim, he leaves the case behind . . . . The "right not to be tried" pertains to the request for damages alone, for that is the source of the distraction. Moreover, if a request for an injunction prevented appeal on the question of immunity, plaintiffs who wished to harass officials to travail would need only demand equitable relief, defeating the defendants' opportunity to obtain prompt review.

Id. at 1153-54; *see also Marx v. Gumbinner*, 855 F.2d 783, 787 (11th Cir. 1988) (emphasizing difference from government official's perspective between standing trial on claim for money damages and for injunctive relief); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 717-18 (10th Cir. 1988) (noting that government officials are at risk of personal liability and punitive damages, and may incur expense of hiring private counsel). *Accord DiMartini v. Ferrin*, 889 F.2d 922, 924-25 (9th Cir. 1989), *amended on other grounds*, 906 F.2d 465 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2796 (1991); *Giacalone v. Abrams*, 850 F.2d 79, 84-85 (2d Cir. 1988); *Young v. Lynch*, 846 F.2d 960, 961-63 (4th Cir. 1988); *Drake v. Scott*, 812 F.2d 395, 398 (8th Cir.), *cert. denied*, 484 U.S. 965 (1987); *Kennedy v. City of Cleveland*, 797 F.2d 297, 305-6 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103

(1987); *De Abadia v. Izquierdo Mora*, 792 F.2d 1187, 1188-90 (1st Cir. 1986).

Despite our own dissatisfaction with the *Prisco* rule, as a panel of three judges we are bound to follow our circuit's precedent. *See* Internal Operating Procedures, United States Court of Appeals for the Third Circuit, Rule 9.1. A recent opinion from this court voiced similar concerns, but also felt bound to apply *Prisco*. *See Schrob v. Catterson*, No. 91-5669, 1992 U.S. App. LEXIS 14660, at *35-45 (3d Cir. June 29, 1992). It follows that because Sheriff Jay Roberts would remain a defendant in his official capacity to plaintiffs' claims for reinstatement, we do not have appellate jurisdiction at this time to review the denial of his qualified immunity defense.

It was, however, brought to our attention through counsel's letter briefs that Commissioner and Salary Board Member Joseph Roberts retired on January 6, 1992, and is no longer a Cambria County Official. Thus, like former Attorney General William French Smith, who was a defendant in *Prisco* but had ceased to be a public official, Commissioner Roberts is a defendant "only for the purpose of obtaining money damages from him," *Prisco*, 851 F.2d at 97, and can appeal from the order denying his motion for summary judgment on qualified immunity grounds. His, therefore, is the only appeal properly before us. We note, however, as we did concerning the appeals of the defendants who did not raise qualified immunity to support their motions for summary judgment in the district court, Jay Roberts's contentions do not differ in substance from those of Joseph Roberts, so that our continued adherence to *Prisco* will not

prevent us from considering the qualified immunity defense.

As to Joseph Roberts's appeal, we exercise plenary review over the "purely legal" question presented. *Lee v. Mihalich*, 847 F.2d 66, 67 (3d Cir. 1988).

III.

Discussion

A.

Applicable Constitutional Right

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court enunciated the two-part, objective test for qualified immunity:

> government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

The "constitutional right of which a reasonable person would have known" which plaintiffs invoke in this case is the First Amendment's prohibition of the dismissal of public employees from their jobs solely because of their partisan political affiliation. *Branti v. Finkel*, 445 U.S. 507, 517-20 (1980); *Elrod v. Burns*, 427 U.S. 347, 360-73 (1976) (plurality opinion); *Zold v. Township of Mantua*, 935 F.2d 633, 635 (3d Cir. 1991). In *Elrod*, the Court held that the dismissal of a "nonpolicymaking, nonconfidential government employee" for that reason was unconstitutional as

a severe restriction on political belief and association. 427 U.S. at 375 (Stewart, J., concurring in judgment). As the Court stated in *Connick v. Myers*, 461 U.S. 138, 149 (1983), "official pressure upon employees to work for political candidates not of the workers' own choice constitutes a coercion of belief in violation of fundamental constitutional rights."[5]

Justice Brennan's plurality opinion in *Elrod* found a "presumptive prohibition" against patronage dismissals[6] and put the burden on the defendant to demonstrate that party affiliation "further[ed] some vital government end by a means

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5. *Connick* is representative of a somewhat distinct line of First Amendment cases arising out of the public employee's right to comment on matters of public interest. In those cases, the courts must balance the citizen's right to comment upon public affairs and the public employer's interest in promoting efficiency in public services by controlling whom it employs. *See* Pickering v. Board of Education, 391 U.S. 563 (1968); *see also* Zamboni v. Stamler, 847 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 899 (1988). The inquiry in those cases generally focuses on whether the speech concerned a matter of public concern and whether it caused unacceptable internal disruption. In *Connick* the Court held that the speech in question should not be characterized as an employee grievance concerning internal office policy and thus found no First Amendment violation. Of interest here, however, was the Court's statement that it is "apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community." 461 U.S. at 149.

6. The Court recently extended the application of *Branti-Elrod* to promotions, transfers, recalls, and hiring decisions. *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2739 (1990). This brings the allegations of plaintiff Beaujon, who was a per diem employee of the sheriff's office, within the scope of *Branti-Elrod*.

that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Id.* at 360-63.

In *Brantl*, the Court reformulated the test and held that

> the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

445 U.S. at 518.

Commissioner Roberts suggests that the political dismissal of deputy sheriffs is not a violation of the First Amendment because that position is one that falls within the exception for those for whom "party affiliation is an appropriate requirement for the effective performance of the public office involved."[7] The burden to show the application of such an exception is on the defendants. As the *Brantl* Court stated,

> unless the government can demonstrate "an overriding interest," "of vital importance," requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.

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7. Commissioner Roberts's brief is sparse, primarily directed to the "I didn't do it" defense. However, because Commissioner Roberts incorporated the arguments of his co-defendants into his appellate brief as permitted by Fed. R. App. P. 28(i), we will treat his co-defendants' arguments as his own for the purpose of this appeal.

445 U.S. at 515-16 (citations omitted) (quoting *Elrod*, 427 U.S. at 368, 362); *see also Zold*, 935 F.2d at 635 ("The burden of proof is on the defendant to demonstrate 'an overriding interest' in order to validate an encroachment on an employee's First Amendment rights." (quoting *Elrod*, 427 U.S. at 368)).

In *Brantl* the issue was whether assistant public defenders could be fired by an incoming Public Defender solely for their political party affiliation. The Court found that assistant public defenders did not fit into the category of those for whom party affiliation may be relevant since their responsibility was to represent individuals against the State. Premising their job tenure on party affiliation, the Court found, would undermine, not promote, their job performance. *Brantl*, 445 U.S. at 519-20.

The defendant has a "substantial burden of demonstrating that political affiliation is an appropriate requirement for the effective performance of the deputy [sheriff]." *Zold*, 935 F.2d at 640. We look foremost at the "function of the public office in question." *Brown v. Trench*, 787 F.2d 167, 168 (3d Cir. 1986); *see also Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986) (en banc) (threshold inquiry of whether position relates to "'partisan political interests'" followed by inquiry into "particular responsibilities of the position" (quoting *Brantl*, 445 U.S. at 519)), *cert. denied*, 481 U.S. 1014 (1987).

In making the *Brantl-Elrod* analysis, we have held that *Brantl*'s protection does not extend to an assistant director of public information, *Brown*,

787 F.2d at 168 (3d Cir. 1986); assistant district attorneys, *Mummau v. Ranck*, 531 F. Supp. 402, 404 (E.D. Pa. 1982), *aff'd*, 687 F.2d 9 (3d Cir. 1982) (per curiam); and city solicitors and assistant city solicitors, *Ness v. Marshall*, 660 F.2d 517, 522-23 (3d Cir. 1981). *See* Susan Lorde Martin, *A Decade of Branti Decisions: A Government Official's Guide to Patronage Dismissals*, 39 Am. U. L. Rev. 11, 23-48 (1989) (listing cases from other circuits).

All counsel in their briefs and during oral argument agreed that deputy sheriffs in the Cambria County Sheriff's office primarily perform three tasks: they serve process; they transport prisoners to and from court and between facilities; and they provide security for courtrooms. Roberts contends that party affiliation is related to job performance inasmuch as a sheriff must be assured of the loyalty and confidentiality of his deputies and he has a strong interest that everyone in his department "get along," particularly since the sheriff's office is small.

We cannot say as a matter of law that party affiliation would further the effective performance of these tasks. In *Elrod*, one of the plaintiffs was the chief deputy of the process division, presumably more of a policymaking position than one who simply serves process, and he was held entitled to First Amendment protection. 427 U.S. at 350 (plurality opinion) and 375 (Stewart, J., concurring). The defendants have offered no reason why the political alignment between the deputy sheriffs and the sheriff is relevant to the deputies' duties in serving process, transporting prisoners, or guarding courtrooms.

Nor is it apparent why the small size of the sheriff's office, a factor defendants stress, makes partisan affiliation a relevant factor. In *Brantl*, there were only nine assistant public defenders but the Court held that they enjoyed First Amendment protection. Although loyalty and confidentiality of sheriff's deputies are desirable attributes, those traits are needed for many working relationships. It has never been suggested that the need for loyalty and confidentiality alone supports politically motivated dismissals independent of the tasks which the employee must perform. *See Elrod*, 427 U.S. at 367.

This case stands in contrast to *Brown v. Trench*, where we held that the Assistant Director of Public Information for Bucks County would perform her duties of writing press releases and acting as spokesperson for elected county Commissioners most effectively if she shared the Commissioners' political beliefs, 787 F.2d at 170, and *Ness v. Marshall*, where we held that because the mayor relied on city solicitors to perform functions "intimately related to city policy, the mayor has the right to receive the complete cooperation and loyalty of a trusted adviser." 660 F.2d at 522. Here, there is no evidence that the sheriff himself performs any policy making function or that he relies on his deputies for any policy-type duties.

Nor does the sheriff's position as an elected official justify the political dismissal of his potential substitute. In *Furlong v. Gudknecht*, 808 F.2d 233 (3d Cir. 1986), we found that because politics was inapposite to the duties of the elected Recorder of Deeds, the possibility that the Second Deputy Recorder could occupy the Recorder's position was not dispositive of the question of the

relevance of party affiliation to the position. *Id.* at 236-37. Similarly, the possibility that the Chief Deputy may succeed to the Sheriff's position does not alone justify requiring their political alignment.

Other courts have reached similar results. In *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), the court, after noting that the *Branti* Court "[f]latly rejected . . . any general notion that mutual trust and confidence could only exist between members of the same political party," held that the duties of the deputy sheriffs did not implicate "'partisan political interests.'" *Id.* at 1338 (quoting *Branti*, 445 U.S. at 519); *see also Barrett v. Thomas*, 649 F.2d 1193, 1201 (5th Cir. 1981) (Unit A) (holding that in large department, "the absence of political cohesion between sheriff and deputy can hardly be said to undermine an intimate working relationship"), *cert. denied*, 456 U.S. 925 (1982); *Francia v. White*, 594 F.2d 778 (10th Cir. 1979) (deputy sheriffs in non-policymaking positions who were adequately performing their jobs protected under *Elrod*). *Contra Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991) (because of "autonomy and discretionary authority" exercised by deputy sheriffs, political considerations were justified in employment decisions), *cert. denied*, 112 S. Ct. 1262 (1992); *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989) (affirming dismissal of claims by former deputy sheriffs that they were dismissed for political reasons).[8]

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8. Significantly, the court reversed the dismissal of the claims of jailers and process servers who were also employed by the Sheriff's office, tasks which in Cambria County are performed by deputy sheriffs.

In short, on the basis of the record, which fails to show that Cambria County deputy sheriffs enjoy significant autonomy or discretion in their jobs or that their political activities are relevant to their duties, we hold that Roberts has failed to demonstrate that firing deputy sheriffs for their political affiliation or activities comes within the narrow exception for political dismissals recognized in *Branti* and *Elrod*. As for plaintiff Ardini, a paramedic and coordinator of patient transportation for a Cambria County agency, the defendants have raised no arguments as to how her job falls under the exception to the prohibition against patronage dismissals. Commissioner Roberts does claim that he did not have the power to dismiss Ardini but, as noted *supra*, that is not an issue we address in this limited review.

B.

Clearly Established Standard

Roberts argues, however, that it was not clearly established at the time of these dismissals that deputy sheriffs, as distinguished from other public officials, were indeed protected under the *Branti-Elrod* line of cases, and therefore he is still entitled to qualified immunity. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court delineated the "clearly established" standard:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but

> it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (citations omitted).

This court has "'adopted a broad view of what constitutes an established right of which a reasonable person would have known.'" *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726 (3d Cir. 1989) (quoting *Sourbeer v. Robinson*, 791 F.2d 1094, 1103 (3d Cir. 1986), *cert. denied*, 483 U.S. 1032 (1987)), *cert. denied*, 493 U.S. 1044 (1990). In *People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 144-45 (3d Cir. 1984), we held that there does not have to be "precise factual correspondence" between the case at issue and a previous case in order for a right to be "clearly established," and we would not be "faithful to the purposes of immunity by permitting . . . officials one liability-free violation of a constitutional or statutory requirement." *Cf. Jones*, 727 F.2d at 1336 (noting that exception to prohibition against patronage dismissals is "extremely narrow").

This court has already observed that it was "clearly established" by 1982, before the events in this case, that public employees could not be fired for their political affiliation. In *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), we stated that it was clearly established that public officials could not be demoted for their political associations:

> we cannot, in good conscience, conclude that in 1982 a reasonably active politician would not have believed that it would be impermissible to demote an employee in retaliation for his political speech and/or associations. . . . [A]s of 1982 the law was "clearly established" that a public

> employee could not be demoted in retaliation for exercising his rights under the first amendment.

Id. at 733. One could hardly contend that the rule was otherwise as to dismissals.

Roberts relies on the opinion of the Seventh Circuit in *Upton*, which held that it was not "clearly established" that deputy sheriffs had a right to be free from political firing. 930 F.2d at 1217. We note that one of the bases for the *Upton* court's decision was its perception of the difficulty that courts have had in applying *Branti-Elrod* and "the failure of the courts to develop and apply a consistent set of principles concerning patronage dismissals." *Id.* at 1213.

We have not tracked the early development of the *Branti-Elrod* cases in the Seventh Circuit, but we are satisfied that the decisions of this court have been sufficiently consistent to have clearly established to all state and municipal employers that firing or other adverse employment action for political reasons contravenes the Constitution unless defendants could show that the particular position came within the narrow exception. We see no reason why any reasonable employer would have thought deputy sheriffs, whose work consisted of serving process, transporting prisoners, and guarding courtrooms, could be fired for political reasons.

We also note that, for the purposes of determining whether a right is "clearly established," the court must look to the status of the law at the time of the challenged actions. *Mitchell*, 472 U.S. at 528; *Lee*, 847 F.2d at 71. Thus, the defendants could not have been relying on *Upton* or *Terry* because these cases were

decided after the plaintiffs were dismissed from their jobs. On the other hand, *Jones* and *Barrett*, which held that deputy sheriffs were protected by *Branti-Elrod*, were decided in 1984 and 1981 respectively, before the incidents that gave rise to this case.

Although plaintiff Mutsko was acting chief deputy sheriff at the time of his dismissal, he testified in his deposition, and Roberts has not disputed, that the only difference between being a chief deputy and a deputy was the pay scale. Thus, although Mutsko was "in charge" when the acting sheriff was away, his duties remained purely ministerial, involving only assigning deputies to courthouses and following court orders, and therefore there would have been no reasonable basis for distinguishing between him and his colleagues.[9]

Accordingly, we hold that Commissioner Roberts "should have related this established law to the instant situation," *Hicks v. Feeney*, 770 F.2d 375, 380 (3d Cir. 1985), because it was clearly established in January 1986 that the plaintiffs, deputy sheriffs and a paramedic, could not be dismissed from their jobs for failure to support Jay Roberts in his bid for sheriff or work in his political campaign. It follows that Roberts could not have been objectively reasonable in participating in the political firing of the plaintiffs. *See Anderson*, 483 U.S. at 641 (under appropriate

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9. We note that Mutsko was the acting chief deputy sheriff because the chief deputy was elevated to acting sheriff after the death of the sheriff. Thus, after Sheriff Roberts's election, Mutsko may only have had a legitimate expectation of remaining as a deputy sheriff, not as the chief deputy sheriff.

circumstances, the issue of defendant's reasonable beliefs can be determined as a matter of law).[10]

Of course, our conclusion that as a matter of law Roberts is not entitled to qualified immunity does not prevent Roberts and his co-defendants from raising other defenses at trial. *See Stoneking*, 882 F.2d at 731. They can deny their involvement in the dismissals (the 'I didn't do it' defense referred to above), or they can claim that the dismissals were justified on other grounds. *See Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); *Jones*, 727 F.2d at 1335. These issues remain for the trier of fact.

IV.

CONCLUSION

For the foregoing reasons, we hold that it was clearly established by 1986 that Cambria County sheriffs' deputies and paramedics were protected under the First Amendment from patronage

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10. Patently, the fact that deputy sheriffs serve at the pleasure of the sheriff, 16 Pa. Cons. Stat. Ann. § 1205, and the legal opinion obtained by Sheriff Roberts from the Cambria County Personnel Office stating that he had statutory authority to hire and fire deputies without "just cause," cannot justify dismissal from public employment for an unconstitutional reason. *See* Perry v. Sinderman, 408 U.S. 593, 597-98 (1972).

Our conclusion that the applicable law was clearly established distinguishes Lee v. Mihalich, 847 F.2d 66 (3d Cir. 1988), on which defendants rely. In *Lee*, we found that the relevant provision of Pennsylvania law was unsettled at the time, and thus the defendants were reasonable in relying on a legal opinion to bring the prosecution for which they were being sued.

dismissals. We will affirm the district court's denial of defendant Joseph Roberts's motion for summary judgment on the grounds of qualified immunity, and dismiss the appeals of the remaining defendants.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-3351

JOHN MUTSKO; ROY PLUMMER;
LOUIS BEAUJON and EVELYN ARDINI

v.

COUNTY OF CAMBRIA, PENNSYLVANIA; CAMBRIA COUNTY SALARY BOARD; JOSEPH P. ROBERTS; RON STEPHENSON and T.T. METZGER, JR., individually and as Commissioners of the Cambria County Board of Commissioners and Members of the Cambria County Salary Board; ROBERT McCORMICK, individually and as Cambria County Controller and Member of the Cambria County Salary Board; THOMAS BURNS, individually and as Acting Sheriff and Member of the Salary Board of Cambria County; JAY ROBERTS, individually and as Sheriff of Cambria County; LAUREL CREST MANOR; WENDELL P. DAVIS, individually and as Administrator of Laurel Crest Manor; and JEFFREY SAINTZ, individually and as the Personnel Director of Cambria County

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SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROTH, Circuit Judges

The petition for rehearing filed by Appellant Jay Roberts in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ D. K. Sloviter
Chief Judge

Dated:Aug 25, 1992

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-3352

EUGENE BURNS; JOHN MUTSKO;
ROY PLUMMER; LOUIS BEAUJON;
RON SNYDER and EVELYN ARDINI

v.

COUNTY OF CAMBRIA, PENNSYLVANIA; CAMBRIA COUNTY SALARY BOARD; JOSEPH P. ROBERTS; RON STEPHENSON and T.T. METZGER, JR., individually and as Commissioners of the Cambria County Board of Commissioners and Members of the Cambria County Salary Board; ROBERT McCORMICK, individually and as Cambria County Controller and Member of the Cambria County Salary Board; THOMAS BURNS, individually and as Acting Sheriff and Member of the Salary Board of Cambria County; JAY ROBERTS, individually and as Sheriff of Cambria County; LAUREL CREST MANOR; WENDELL P. DAVIS, individually and as Administrator of Laurel Crest Manor; and JEFFREY SAINTZ, individually and as the Personnel Director of Cambria County

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SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROTH, Circuit Judges

The petition for rehearing filed by appellant Joseph P. Roberts, No. 91-3352,in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service no having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ D. K. Sloviter
Chief Judge

Dated:Aug 25, 1992

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EUGENE BURNS, JOHN MUTSKO, ROY PLUMMER, LOUIS BEAUJON, RON SNYDER and EVELYN ARDINI

Plaintiffs,

vs. Civil Action No. 87-2606

COUNTY OF CAMBRIA, PENNSYLVANIA; CAMBRIA COUNTY SALARY BOARD; JOSEPH P. ROBERTS, RON STEPHENSON and T. T. METZGER, JR., individually and as Cambria County Board of Commissioners and Members of Cambria County Salary Board; ROBERT McCORMICK, individually and as Cambria County Controller and Member of the Cambria County Salary Board; THOMAS BURNS, individually, and Acting Sheriff and Member of the Salary Board of Cambria County; JAY ROBERTS, individually, and as Sheriff of Cambria County; LAUREL CREST MANOR; WENDELL P. DAVIS, individually and Administrator of Laurel Crest Manor; and JEFFREY SAINTZ, individually, and as Personnel Director of Cambria County;

Defendants.

MEMORANDUM OPINION

June 4, 1991

Plaintiffs have filed a Complaint alleging that the defendants conspired to discharge them from their respective employment positions for exercising their rights under the First and Fourteenth Amendments of the Constitution of the United States. Plaintiffs, Eugene Burns (Burns), John Mutsko (Mutsko), Roy Plummer (Plummer), and Louis Beaujon[1] (Beaujon) were Deputy Sheriffs of Cambria County. Plaintiff, Ron Snyder (Snyder), was employed as a clerk/investigator[2] in the Cambria County

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1 Beaujon was a per diem employee of the Sheriff's Office and was simply not called in to work after Jay Roberts took office as County Sheriff.

2 Though Snyder was not a deputy sheriff, he acknowledges that he was sworn in as a deputy one time for approximately three (3) hours, and from 1972 to February, 1985, he performed all the functions and duties of a deputy sheriff. (See Snyder Deposition Pages 40-48)

Public Defender's Office, but his wages were paid by the Cambria County Sheriff Department. Plaintiff, Evelyn Ardini (Ardini), was employed as a paramedic, and coordinator of patient transportation for defendant, Laurel Crest Manor (Laurel Crest), an agency of Cambria County.

At Count I of the Complaint, the plaintiffs have alleged that their respective employments were terminated because they opposed, and/or failed to support the candidacy of defendant, Jay Roberts, for County Sheriff.

At Count IV[3] of the Complaint, Ardini has alleged defendants refused to grant her individual pre-termination hearings, on the issue of her discharge, in violation of her

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3 Pursuant to Motions to Dismiss, the Honorable Donald E. Ziegler dismissed Counts II, III and VI by Order and Opinion dated May 3, 1988. Count IV was dismissed as to the claims of Burns, Mutsko, Beaujon, Plummer and Snyder.

procedural due process rights under the Fourteenth Amendment.

At Count V, Ardini has alleged she was terminated and replaced with a man, and she was constantly subjected to sexually discriminatory remarks from defendants and defendants' agents.

The defendants have moved for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons below stated, defendants' motions shall be granted in part and denied in part.

In interpreting Rule 56(c), the United States Supreme Court in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) has ruled that:

> "The plain language . . . mandates entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts

immaterial." Celotex, 477 U.S. at 322-323.

An issue of material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Incorporated, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). The moving party bears the initial burden of identifying for the Court those portions of the record which it believes demonstrate the absence of a material fact. Celotex, 477 U.S. at 323. To overcome the movant's assertion that there is no material issue of fact, the opposing party must point to specific evidence. Williams v. Borough of West Chester, 891 F.2d 458, 463-64 (3d Cir. 1989).

FACTS

Eugene Burns, among others, opposed defendant Jay Roberts in the 1985 Democratic Primary for Cambria County Sheriff. At that time, Burns was employed as a deputy sheriff of Cambria County. Burns placed second in the final ballot, and Jay Roberts (Sheriff Roberts) was elected as Sheriff of Cambria County in the general election in November of 1985.

Prior to his installation in office, Sheriff Roberts instructed the Cambria County Salary Board (Salary Board) to take administrative action and remove plaintiffs, Burns, Mutsko, Plummer and Snyder from the Sheriff's Office Payroll. At the Salary Board's meeting of January 2, 1986, upon motion of defendant, Stephenson, seconded by defendant McCormick, and approved unanimously, Burns, Mutsko, Plummer and Snyder were removed from the payroll of the Office of Sheriff. Sheriff Roberts was

installed into office on January 6, 1986, and filed written revocation of Burns, Mutsko, Plummer and Snyder as sheriff deputies. Sheriff Roberts did not schedule a call for work for Beaujon, who was a part-time employee.

The plaintiffs contend Burns was dismissed because he ran against Sheriff Roberts; Mutsko, Plummer and Beaujon were dismissed for their support of Burns' candidacy; and Snyder was dismissed for his failure to dissuade Burns from running for Sheriff.

Plaintiff Ardini alleges that prior to the election she was approached by both Sheriff Roberts and his father Joseph Roberts, who was also a Cambria County Commissioner, with regard to her supervisor at Laurel Crest Manor, William Tomallo (Tomallo). Tomallo was also a candidate for Sheriff. Joseph Roberts allegedly asked Ardini if she heard any phone calls that

Tomallo received at Laurel Crest. Ardini answered in the affirmative, and Joseph Roberts stated he would like a list of the persons who called Tomallo. Ardini contends that Joseph Roberts made the same request a month or two later. Ardini never complied, and she was fired in December of 1985.

COUNT I

a) Qualified Immunity

Defendants, Sheriff Roberts and Commissioner Joseph Roberts, contend they are immune from civil liability for any action or alleged action undertaken in their individual and /or official capacities. Government officials are entitled to qualified immunity for liability for damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known. Mitchell v. Forsyth, 472 U.S. 511, 517, 105

S. Ct. 2806, 86 L. Ed. 2d 411 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1980). The judicially-created doctrine balances the interest in vindicating constitutional rights which have been violated by public officials against the interest in allowing public officials to perform their discretionary duties without fear of disruptive lawsuits and personal liability in money damages. Hynson v. City of Chester, 864 F.2d 1026, 1031 (3d Cir. 1988); see Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987).

A government official will be denied qualified immunity for having violated a clearly established right when "in light of preexisting law the unlawfulness [is] apparent." Anderson, 107 S. Ct. at 3039. The state of the law must be considered at the time of the challenged action. Mitchell, 472 U.S. at 528. The grant of qualified

immunity to the defendants properly depends upon whether the plaintiffs' right to be free from politically based firings was clearly established.

In People of Three Mile Island v. Nuclear Reg. Comm'rs, 747 F.2d 139 (3d Cir. 1984), the Court addressed the issue of analogous precedent in the context of ascertaining "clearly established" law for the purposes of the qualified immunity defense, and rejected a requirement of strict factual identity. Instead, the Third Circuit adopted a more balanced approach which required:

> . . . some but not precise factual correspondence and demanding that officials apply general, well developed legal principles . . . While we cannot expect executive officials to anticipate the evolution of constitutional law, neither can we be faithful to the purposes of immunity by permitting such officials one liability-free violation of a constitutional or statutory requirement. . . Moreover, requiring officials to consider the legal implications of their actions should have a salutary effect.

Id. at 144-45.

The Third Circuit in Bennis v. Gable, 823 F.2d 723 (3d Cir. 1987) specifically concluded that as of 1982 the law was "clearly established" that a public employee could not be discharged, transferred, demoted or reprimanded in retaliation for exercising his rights under the First Amendment. In this regard the defendants' position is untenable.

Sheriff Roberts contends that he could not reasonably have been expected to know that his actions could violative of the law, since the clear statutory language of 16 Pa. C.S.A. §§1203 and 1205[4]

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4 Section 1203 in pertinent part provides:

> The sheriff of each county shall appoint . . . a chief deputy, whose appointment shall be revocable at pleasure on recording . . . a signed revocation thereof . . .

Section 1205 in pertinent part provides:

afforded him the power to revoke appointments at his "pleasure." Sheriff Roberts further points to his request for a legal opinion from the Cambria County Personnel Office[5] as evidence of his reasonable belief he was acting within the law. Defendant cites Lee v. Mihalich, 847 F.2d 66 (3d Cir. 1988) as authority for the reasonable reliance upon an opinion of counsel. In Lee, the law pertaining to the Pennsylvania statute of limitations was unclear, that is not the case here.

(Footnote 4 Continued From Previous Page)
appoint such deputies and clerks as may be necessary . . . He may revoke the appointment of deputies in the same manner as his chief deputy . . .

5 Such opinion merely reiterated the statutory language of 16 Pa. C.S.A. §§ 1203 and 1205, and mentioned the effect of such statutes on the County Labor Agreement. There is no mention of the effects of Sections 1203 and 1205 upon the rights secured by the Constitution of the United States.

It is the objective reasonableness of a defendant's actions that governs; what the defendant actually believed or did not believe is irrelevant to the qualified immunity analysis. Anderson, 107 S. Ct. at 3034. Because the law was clearly established as of 1982, this Court is not inclined to believe that a reasonable jury would elevate state statutory language above the rights afforded by the United States Constitution. As a matter of law, we fail to find the existence of a qualified immunity for defendants.

b) 42 U.S.C. § 1983 - Violation of First Amendment

In order to establish a claim under § 1983, plaintiffs must show "(1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges or immunities secured by the Constitution of the United States." Robb

v. City of Philadelphia, 733 F.2d 286, 290-91 (3d Cir. 1984).

In actions arising out of termination of public employment based on allegations of conduct protected by the First Amendment, the burden is on the plaintiff to establish that the protected activity was a "substantial" or "motivating" factor in the termination. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); Brown v. Reardon, 770 F.2d 896, 905 (10th Cir. 1985); Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981). The Third Circuit in Commonwealth Bank & Trust v. Russell, 825 F.2d 12, 14 (3d Cir. 1987), stated that § 1983 requires a plaintiff to prove the constitutional deprivation is "fairly attributable" to the defendant's conduct.

Looking at the claims of the individual plaintiffs, we find that a material issues of fact exist as to whether the plaintiffs' political activities were "substantial" or

"motivating" factors in the termination of all plaintiffs except Ronald Snyder. It is undisputed in the record that Snyder was a convicted felon. He readily admits that he pleaded guilty to burglary twice and to robbery once, and was incarcerated on two of those occasions. Under 16 Pa. U.S.C. § 1206, Snyder is unable to hold the position of deputy sheriff. In addition, Snyder has admitted that he actually campaigned for Sheriff Roberts, and tried to dissuade Burns from entering the election. Based on the above, Summary judgment shall be granted on behalf of the defendants and against Snyder.

Having determined that a material issue of fact exists as to whether plaintiffs were discharged because they engaged in protected activity, the Court must determine whether, even if they were discharged based upon protected activity, were such discharges legal.

In Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), the Supreme Court proscribed the dismissal of public employees based upon his or her political beliefs. Despite prohibition on patronage practices, the First Amendment permits some patronage discharges. The Supreme Court allowed the dismissal of employees who are likely to be formulating and implementing the policies of the party in power for lacking the correct political affiliation. The theory is that a newly elected administration has a legitimate interest in implementing the broad policies it was elected to implement without interference from disloyal employees. Elrod, 427 U.S. at 367. Elrod thus distinguishes employees who are either "policymaking" or "confidential" from non-policymaking, non-confidential employees. The former can be dismissed for their political beliefs, but the latter cannot.

The Supreme Court revised the standard set in Elrod four years later in Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).

> In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518. The focus of the Third Circuit is whether the employee has meaningful input into decision making concerning the nature and scope of a major program. Furlong v. Gudknecht, 808 F.2d 233, 235 (3d Cir. 1986).

This matter is not a strict party patronage hiring or firing case. Because the allegations of the plaintiffs arise from Burns' candidacy and the support of such candidacy, or the failure to support Sheriff Roberts' candidacy, and not from substantial political differences among the litigants,

this matter is akin to the political speech cases. It must, therefore, be determined whether the fact that the litigants were campaign contestants would adversely affect performance of the Sheriff's Office.

Plaintiff, Burns, was a candidate for Sheriff, adverse to the candidacy of Sheriff Roberts. The selection of Sheriff Roberts is based significantly on the popular approval of his political agenda. Burns' active opposition to Sheriff Roberts and his political agenda could make Burns appear hostile and unreliable, to the voting public, in carrying out the policies of the newly elected Sheriff. Because the sheriff depends on the performance of his deputies in carrying out the duties of the office, it is realistic for the sheriff to consider outright opposition to his candidacy a threat to the proper function of the Sheriff's Office. In a small department, a Sheriff's core group of advisers is likely to include

his deputies. Burns' candidacy in opposition to Sheriff Roberts is a situation which, this Court finds, falls within the Elrod and Branti exceptions to the proscription of political affiliation discharges.

Because the discharge of Burns is not prohibited under the First Amendment, summary judgment will be granted in favor of defendants and against plaintiff, Eugene Burns.

Whether the campaign involvement of the remaining deputy plaintiffs was such that the operation of the Sheriff's Office would be adversely affected by such cannot be determined as a matter of law. Political loyalty as a requirement to the maintenance of the position of deputy sheriff is determinable upon the reflection on the functions performed by a particular occupant of that office.

As far as Ardini is concerned, we find her political affiliation to be of no

significance to the operation of the Sheriff's Office or to the operation of Laurel Crest Manor. We find, therefore, her discharge to be outside the exceptions of Elrod and Branti.

Looking at the record in a light most favorable to the nonmoving parties and giving such parties the benefit of all favorable inferences drawn from the evidence, the Court now turns to the matter of determining which defendants acted under color of state law and/or whether their conduct "fairly attributed" to the constitutional deprivations of the plaintiffs.

c) Cambria County Salary Board and Cambria County Commissioners

The defendants assert that because neither the Salary Board nor the County Commissioners had authority to hire or fire the deputy sheriffs, they are entitled to summary judgment. Notwithstanding the Salary Board's and Commissioners' lack of statutory

actions. See Bennis v. Gable, 823 F.2d 723 (3rd Cir. 1987) at footnote 11. In Bartholomew v. Fischl, 782 F.2d 1148 (3d Cir. 1986), the Third Circuit held that allegations that policy-making officials, without specific statutory authority to discharge, had conducted a retaliatory campaign against public employees in order to suppress free speech was sufficient to establish a cause of action under the Civil Rights Statute.

Based upon our findings above that material issues of fact exist as to whether plaintiffs' political activities were motivating factors in their dismissals, and because the plaintiffs allege a conspiracy among the defendants, the Motions for Summary Judgment of the Salary Board, the Commissioners and their individual members[6]

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6 Such individual members include: Joseph P. Roberts, Ron Stephenson, T.T. Metzger, Jr.,

shall be denied as to all remaining plaintiffs.

d) Wendell Davis

Defendant, Davis, was an employee of DECA, a managing company hired by Cambria County to operate Laurel Crest Manor. Davis, as Administrator of Laurel Crest, was responsible for the operation of Laurel Crest and reported directly to the County Board of Commissioners. Because he was employed by a private company, defendant claims he is not subject to the § 1983 claims because he could not act under color of state law.

The Supreme Court has held that a private citizen acting in concert with public officials to deprive others of constitutional rights is also acting "under color" of state law for purposes of § 1983. See Dennis v. Sparks, 449 U.S. 24, 27-28, 101 S. Ct. 183, 186-87, 66 L. Ed. 2d 185 (1980); Adickes v.

(Footnote 6 Continued From Previous Page)
Robert McCormick, and Thomas Burns

S.H. Kress & Co., 398 U.S. 144, 152, 90 S. Ct. 1598, 1605, 26 L. Ed. 2d 142 (1970); Also see Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977). With regard to plaintiff, Ardini, there is sufficient evidence to show an existence of a material issue of fact regarding whether Davis acted in concert with state officials to deprive Ardini of constitutional rights. As to Ardini's § 1983 claim, Davis' Motion for Summary Judgment fails.

With regard to the deputy sheriff plaintiffs, however, Davis' Motion for Summary Judgment will be granted. Though there is evidence of Davis' political activity, that alone does not show a nexus between his actions and the dismissal of the deputies. This Court is unable to find any evidence indicating that the constitution deprivations claimed by the deputies are "fairly attributable" to Davis' conduct.

e) Jeffrey Saintz and Laurel Crest Manor[7]

Defendant, Saintz, was the Personnel Director for all of Cambria County and Laurel Crest Manor. Defendant contends that he is entitled to summary judgment because he had no input in the dismissals of the plaintiffs. In conjunction with our analysis of defendant Davis' contentions, we find that the actions of Saintz to be insufficiently related to the discharge of the deputies, and summary judgment will be granted as to their claims.

With regard to plaintiff, Ardini, there is sufficient evidence to show an existence of a material issue of fact regarding whether Saintz acted to deprive Ardini of constitutional rights. As to Ardini's § 1983 claim, Saintz' Motion for Summary Judgment will be denied.

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7 Defendant Laurel Crest Manor has set forth no argument as to why summary judgment should be entered on its behalf. As such, summary judgment will not be granted on its behalf.

f) Cambria County

Under Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), in order for a local governing body to be sued directly under § 1983, it must be shown that such constitutional deprivations were pursuant to a governmental custom or policy. Such custom or policy need not receive formal approval through the government's official decision making channels. There exists a material issue of fact as to whether a custom or policy existed in Cambria County regarding politically motivated firings. The Motion for Summary Judgment on behalf of Cambria County shall be denied.

g) Jay Roberts

Jay Roberts, along with his father, Commissioner Joseph P. Roberts, were the prime movers in all of the alleged politically motivated discharges. There exists material issues of fact as to Sheriff

Roberts' role in the alleged deprivations, and as such summary judgment against the remaining plaintiffs on the § 1983 action shall be denied.

COUNT IV

At Count IV, Ardini has alleged defendants refused to grant her individual pre-termination hearings, on the issue of her discharge, in violation of her procedural due process rights under the Fourteenth amendment.

A plaintiff is entitled to a predetermination hearing where she has a right to, or a property interest in, continued employment. Board of Regents v. Toth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1970); Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). The issue of whether an employee has a property interest in employment is to be decided by reference

to state law. Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976).

Ardini relies upon DeFrank v. County of Greene, 50 Pa. Comm. Ct. 30, 412 A.2d 663 (1981) and Appeal of Colban, 58 Pa. Comm. Ct. 104, 427 A.2d 313 (1981) for the proposition that provisions in an employee handbook or manual are a form of guarantee of employment. In DeFrank, a discharged county employee argued that the County was estopped from denying the validity of the procedures for discharge set forth in its personnel manual and the Commonwealth Court agreed. In the case at bar, there is no such procedure set forth in the Laurel Crest Manor Employee Booklet. We, therefore, do not find DeFrank to be applicable.

In Colban, the Commonwealth Court held that the discharge procedure contained in the county's employee handbook was "a form of guarantee of employment during unoffending conduct or until after being thrice warned of

a minor infraction." Id. at 107, 427 A.2d at 314. The court did not hold that the employee handbook was a contract granting the employee a property right in his employment. See Pivarnik v. Commonwealth, Department of Transportation, 82 Pa. Comm. Ct. 42, 474 A.2d 732, 735 (1984). Again, we do not have a discharge procedure outlined in Laurel Crest Manor Employee Booklet.

As a rule, public employees in Pennsylvania have at-will status and are subject to summary removal by the employing agency. Scott v. Philadelphia Parking Authority, 402 Pa. 151, 166 A.2d 278 (1960); Cooley v. Pennsylvania Housing Finance Agency, 830 F.2d 469 (3d Cir. 1987). The court in Abraham v. Pekarski, 537 F. Supp. 858 (E.D. Pa. 1982), affirmed in part, 728 F.2d 167 (3d Cir. 1984), cert. denied, 467 U.S. 1242, 104 S. Ct. 3513, 82 L. Ed. 2d 822 (1984) noted that the general test for a property right vesting in a public employee

is whether there was an enforceable expectation of continued employment.

Ardini bases her claim on a property right in her employment on the employment booklet. Based upon the holdings in Scott, Pivarnik, and Cooley, this Court finds that no such property interest exists. The employee booklet merely serves as a guideline for the employees and acceptance of it cannot be construed as creating a contractual relationship between the county agency and its employees. Whether or not a public employee has a property right in his employment is "a matter of legislative grace." Scott, 402 Pa. at 154, 166 A.2d at 280. Summary judgment shall be granted on Count IV against Ardini and in favor of all defendants.

COUNT V

At Count V, Ardini has alleged she was terminated and replaced with a man, and she was constantly subjected to sexually

discriminatory remarks from defendants and defendants' agents. Count V was dismissed as to defendant Jay Roberts by order of the Honorable Donald E. Ziegler on May 3, 1988, but was allowed to go forward against the remaining defendants.

Under § 1983, in order to prove a violation of her right to equal protection, Ardini must show the existence of "purposeful discrimination." Batson v. Kentucky, 476 U.S. 79, 93, 106 S. Ct. 1712, 1721, 90 L. Ed. 2d 69 (1986). An equal protection claim arises when an individual contends that he or she is receiving different treatment than that received by other individuals similarly situated. Kuhar v. Greensburg-Salem School District, 616 F.2d 676, 677 n. 1 (3d Cir. 1980). To prevail, Ardini need not establish a pattern of official discrimination, but a single incident of discrimination could suffice to support such a claim. Batson, 476 U.S. at 95, 106 S. Ct. at 1722.

With regard to the liability of Ardini's supervisors, Davis and Saintz, the Supreme Court has held that supervisory officials do not violate constitutional rights of victims unless they have played an "affirmative part" in the misconduct. Rizzo v. Goode, 423 U.S. 362, 377, 96 S. Ct. 598, 607, 46 L. Ed. 2d 561 (1976). The Third Circuit has found that liability as a result of supervisory inaction could be imposed when there is: (1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents; and (2) circumstances under which the supervisor's inaction could be found to communicate a message of approval to the offending subordinate. Colburn v. Upper Darby Twp., 838 F.2d 663, 673 (3d Cir. 1988); see also Freedman v. City of Allentown, 853 F.2d 1111, 1116-17 (3d Cir. 1988).

To support her claims, Ardini alleges: (1) After her termination she was replaced by

a man, Mr. Schreyer; (2) Schreyer would tell her she could not do things as well as a man; (3) Schreyer told her she would be replaced by a man; and (4) Mr. Tomallo, her immediate supervisor, who is not a defendant in this lawsuit, allegedly told Ardini she could do certain things better because she was a woman, such as mouth-to-mouth resuscitation in that she has a bigger chest. We fail to find that such allegations rise to the level of "purposeful discrimination."

The only allegation against a supervisor is that against Tomallo, and he is not a named defendant. Ardini fails to connect any of the defendants with the sexual discriminatory remarks directly or indirectly. Nor is Ardini able to meet the criteria of Colburn necessary to impose supervisory liability due to inaction. This Court, finds, therefore, the claims of sexual discrimination against defendants Davis and Saintz must fail.

Ardini's claims against the remaining individual defendants also fail for lack of supporting evidence. Failing to find liability on the part of any of the individual defendants, Ardini's claim against the County of Cambria and/or the county agencies must also fail.

Summary judgment on behalf of all defendants shall be granted against Ardini with regard to her allegations of violations of § 1983 due to sexual discrimination under Count V of the Complaint.

An appropriate order shall follow.

Lee, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EUGENE BURNS, JOHN MUTSKO, ROY PLUMMER, LOUIS BEAUJON, RON SNYDER and EVELYN ARDINI	)
Plaintiffs,	)
vs. Civil Action No. 87-2606	)
COUNTY OF CAMBRIA, PENNSYLVANIA; CAMBRIA COUNTY SALARY BOARD; JOSEPH P. ROBERTS, RON STEPHENSON and T. T. METZGER, JR., individually and as Cambria County Board of Commissioners and Members of Cambria County Salary Board; ROBERT McCORMICK, individually and as Cambria County Controller and Member of the Cambria County Salary Board; THOMAS BURNS, individually, and Acting Sheriff and Member of the Salary Board of Cambria County; JAY ROBERTS, individually, and as Sheriff of Cambria County; LAUREL CREST MANOR; WENDELL P. DAVIS, individually and Administrator of Laurel Crest Manor; and JEFFREY SAINTZ, individually, and as Personnel Director of Cambria County;	)
Defendants.	)

ORDER OF COURT

AND NOW, this 4th day of June 1991, upon consideration of defendants' Motions for Summary Judgment, and the plaintiffs' response thereto, it is hereby

ORDERED as follows:

1. Summary Judgment on behalf of defendants, County of Cambria; Cambria County Salary Board; Joseph P. Roberts, Ron Stephenson, T.T. Metzger, Jr., individually and as Cambria County Board of Commissioners and members of the Cambria County Salary Board; Robert McCormick, individually and as Cambria County Controller and member of the Cambria County Salary Board; Thomas Burns, individually and as Acting Sheriff and member of the Cambria County Salary Board; and Jay Roberts, individually, and as Sheriff of Cambria County, is, hereby:

(a) With regard to Count I, GRANTED as to plaintiffs, Eugene Burns and Ron Snyder, and DENIED as to

plaintiffs, John Mutsko, Louis Beaujon, Roy Plummer, and Evelyn Ardini;

(b) With regard to Count IV, GRANTED; and

(c) With regard to Count V, GRANTED.

2. Summary Judgment on behalf of defendants, Laurel Crest Manor; Wendell Davis, individually and as Administrator of Laurel Crest Manor; and Jeffrey Saintz, individually, and as Personnel Director of Cambria County, is, hereby:

(a) With regard to Count I, GRANTED as to plaintiffs, Eugene Burns, Ron Snyder, John Mutsko, Louis Beaujon, and Roy Plummer, and DENIED as to plaintiff, Evelyn Ardini;

(b) With regard to Count IV, GRANTED; and

(c) With regard to Count V, GRANTED.

IN SUMMARY, Count I of the Complaint is the only viable cause of action remaining and the complainants align as follows:

(a) Plaintiffs, John Mutsko, Louis Beaujon and Roy Plummer against defendants, County of Cambria, Cambria County Salary Board; Joseph P. Roberts, Ron Stephenson, T.T. Metzger, Jr., individually and as Cambria County Board of Commissioners and members of the Cambria County Salary Board; Robert McCormick, individually and as Cambria County Controller and member of the Cambria County Salary Board; Thomas Burns, individually and as Acting Sheriff and member of the Cambria County Salary Board; and Jay Roberts, individually, and as Sheriff of Cambria County; and

(b) Plaintiff, Evelyn Ardini against defendants, County of Cambria; Cambria County Salary Board; Joseph P. Roberts, Ron Stephenson, T.T. Metzger, Jr., individually and as Cambria County Board of Commissioners

and members of the Cambria County Salary Board; Robert McCormick, individually and as Cambria County Controller and member of the Cambria County Salary Board; Thomas Burns, individually and as Acting Sheriff and member of the Cambria County Salary Board; and Jay Roberts, individually, and as Sheriff of Cambria County; Laurel Crest Manor; Wendell Davis, individually and as Administrator of Laurel Crest Manor; and Jeffrey Saintz, individually, and as Personnel Director of Cambria County.

s/ Donald J. Lee
Donald J. Lee
United States
District Judge

cc: William C. Andrews, Esq.
Dino S. Persio, Esq.
David R. Johnson, Esq.
Alex E. Echard, Esq.
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No. 92-885

IN THE SUPREME COURT OF THE UNITED STATES

JAY ROBERTS, individually and as Sheriff of Cambria County, and JOSEPH P. ROBERTS individually and as Commissioner of the Cambria County Board of Commissioners and Member of the Cambria County Salary Board,

Petitioners

v.

JOHN MUTSKO, ROY PLUMMER, LOUIS BEAUJON and EVELYN ARDINI,

Respondents

==========

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE THIRD CIRCUIT CLEARLY ESTABLISHED PRIOR TO 1986 THAT PUBLIC EMPLOYEES, SUCH AS DEPUTY SHERIFFS, WERE PROTECTED FROM DISMISSAL BECAUSE OF POLITICAL AFFILIATION?

II. WHETHER THE DISMISSAL OF THE RESPONDENTS BY THE PETITIONERS, AND RELIANCE ON THE LETTER OF THE COUNTY ATTORNEY, WERE NOT OBJECTIVELY REASONABLE?

III. WHETHER THE DEPUTY POSITION IS CONFIDENTIAL SO AS TO MAKE PARTY AFFILIATION A REQUIREMENT OF THE POSITION?

IV. WHETHER THE DENIAL OF SHERIFF ROBERTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS OF QUALIFIED IMMUNITY WAS INTERLOCUTORY AND NOT IMMEDIATELY APPEALABLE?

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STATEMENT OF THE CASE

HISTORY

The Respondents, Mutsko, Beaujon, Plummer and Ardini, along with fellow employees Eugene Burns and Ron Snyder whose causes of action were dismissed by the District Court and whose appeals were rejected by the Third Circuit Court as premature, filed a Complaint in Civil Action for damages and injunctive relief pursuant to the Civil Rights Act, 42 U.S.C. §1983, the First and Fourteenth Amendments to the Constitution of the United States, and other related Federal, State and common law claims. The Plaintiffs before the trial court, Eugene Burns, John Mutsko, Roy Plummer and Louis Beaujon, were deputy sheriffs of Cambria County, whose employments were terminated following the 1986 election for Cambria County Sheriff. The Plaintiff, Ron Snyder, was employed as a Clerk/Investigator at the Cambria County

Public Defender's Office, but his wages were paid by the Cambria County Sheriff's Department. The sixth Plaintiff, Evelyn Ardini, was employed as a Paramedic and Coordinator of Patient Transportation for the Defendant, Laurel Crest Manor, an agency of Cambria County. Plaintiffs Snyder and Ardini were likewise terminated from employment following the 1986 County Sheriff's election.

During the 1986 election for Cambria County Sheriff, the Petitioner Jay Roberts (hereinafter "Sheriff Roberts") was the Democratic Party's endorsed candidate for said office. Deputy Eugene Burns (hereinafter "Burns") also ran for the office of Cambria County Sheriff in that election. Mutsko, Plummer and Beaujon supported Burns in his bid for the office of County Sheriff. During Burns' candidacy, he and Mutsko, Plummer and Beaujon continued to perform their duties as Deputy Sheriffs of the County. The general election took place in November of 1985.

Burns placed second in the final ballot, and the Petitioner Jay Roberts was elected as Sheriff.

During the campaign, the the clerk/investigator Ron Snyder (hereinafter "Snyder") was approached by Thomas Burns, one of the Defendants below, to solicit his support for Jay Roberts' candidacy and to dissuade Eugene Burns from continuing his bid for that office. Evelyn Ardini had been approached by both Sheriff Roberts and his father, Petitioner Joseph Roberts, (hereinafter "Commissioner Roberts") who was also a Cambria County Commissioner at that time, to solicit information from Ardini relative to William Tomallo who was Ardini's supervisor at Laurel Crest Manor, and who was also a candidate for Sheriff. These individuals requested information relative to telephone calls received by Tomallo at Laurel Crest. Ardini did not comply with their request for information.

Prior to his installation into office, Sheriff Roberts instructed the Cambria County Salary Board to take administrative action and remove Burns, Mutsko, Plummer and Snyder from the Sheriff's Office payroll. That action was taken at a meeting of the Salary Board on January 2, 1986. Upon taking office on January 6, 1986, Sheriff Roberts filed written revocations of Burns, Mutsko, Plummer and Snyder as Sheriff Deputies. Sheriff Roberts did not schedule a call for work for Beaujon, who was a part-time employee. Ardini had been summarily discharged from employment by two of the Defendants below, Davis and Saintz on December 6, 1985.

The Complaint was filed on or about December 4, 1987. By Petition dated February 18, 1988, Preliminary Motions were filed on behalf of the Petitioner Joseph Roberts, and on behalf of County of Cambria, Cambria County Salary Board, Joseph P. Roberts, Ron

Stephenson, T.T. Metzger, Jr., Cambria County Board of Commissioners, Robert McCormick, Laurel Crest Manor and Jeffrey Saintz alleging, inter alia, that "any action or alleged action of the aforementioned Defendants is privileged and/or subject to immunity, and therefore, cannot be the basis of a cause of action." A supporting Brief was filed on behalf of those named Defendants. By Petition dated February 19, 1988, a Motion to Dismiss pursuant to Rule 12 was filed on behalf of the Petitoner, Jay Roberts, also alleging, inter alia, that: "Defendant Jay Roberts is immune from civil liability under the doctrine of qualified immunity." A brief was filed in support of this Motion to Dismiss.

By Memorandum Opinion and Order dated May 3, 1988, the Honorable Donald E. Ziegler granted in part and denied in part the Motions to Dismiss. The Court did not grant the Motions to Dismiss on the immunity claim.

The Petitioners, Joseph Roberts and Jay Roberts again raised the issue of qualified immunity in Motions for Summary Judgment under Federal Rule of Civil Procedure 56. By Memorandum Opinion and Order dated June 4, 1991, the Honorable Donald J. Lee granted summary judgment in part to some of the Defendants below and denied summary judgment as to others on the various remaining counts of the Complaint. The Court denied the motion of the Petitioners Sheriff Roberts and Commissioner Roberts for summary judgment on the doctrine of qualified immunity. Subsequent to the June 4, 1991 Opinion and Order, the Petitioners filed an Appeal of the denial of qualified immunity to the Third Circuit Court of Appeals. On June 5, 1991, a status conference was held regarding the effect of the appeal upon the trial which was scheduled for June 10, 1991.

By Memorandum Order dated June 7, 1991 the Trial Court continued the trial until

the firm trial date of February 13, 1993. Subsequent to the status conference of June 5, 1991, Notices of Appeal were filed on behalf of all of the remaining Defendants below with the exception of Wendell P. Davis.

Oral argument was conducted in the Third Circuit Court before a panel of three judges with regard to the qualified immunity issue. By opinion and order dated July 28, 1992, the Court of Appeals affirmed the District Court's denial of Commissioner Roberts' motion for summary judgment and judgment on the grounds of qualified immunity, and also dismissed the appeals of the remaining defendants as not properly before the court. The appeal of Sheriff Roberts was premature because it was interlocutory under the Prisco rationale. The other defendants had failed to properly preserve the immunity issue for appeal.

The Third Circuit Court, considering the merits of Commissioner Roberts' appeal,

determined that he did not have qualified immunity because: 1) political affiliation is not an appropriate requirement for the effective performance of a deputy's duties, thus not falling within the narrow exception recognized in Branti and Elrod; 2) the right of a public employee such as deputies not to be dismissed because of political affiliation was clearly established in the Third Circuit as early as 1982, four years prior to the dismissals in dispute; and, 3) statutory authority of a Sheriff to hire and fire deputies at his pleasure does not justify a dismissal for an unconstitutional reason.

The Petitioners filed petitions for rehearing which were denied by the Appeals Court by order dated August 25, 1991.

The Petitioners have filed the instant petition with this Honorable Court seeking Certiorari. The within brief is filed on behalf of the Respondents in opposition thereto.

SUMMARY OF THE ARGUMENT

The Third Circuit Court of Appeals clearly established in 1982 that the firing or dismissal of public employees, such as police officers and sheriff's deputies, based solely on political affiliation, is a violation of the employee's constitutionally protected rights to free speech. In the Third Circuit the law is "clearly established" when there is at least some correspondence between relevant case precedents and the conduct in dispute. Public officials in the Third Circuit are expected to apply general, well developed legal principles when considering analogous factual situations. In Bennis v. Gable, 823 F.2d 723 (3rd Cir. 1987), the Third Circuit pronounced that the illegality of political patronage firings or retaliatory action against employees for exercising First Amendment rights was clearly established as of 1982. The Seventh Circuit decision in Upton

v. Thompson, 930 F.2d 1209 (7th Cir. 1991) is fact specific and does not constitute a conflict with the Third Circuit per se.

The actions of the Petitioners and their reliance on the opinion letter of the County Solicitor was not "objectively reasonable." The firing of an at-will employee for an illegal or discriminatory reason is prohibited. The Sheriff does not have carte blanche to ignore such prohibitions against constitutional deprivations. Reliance on the opinion of the County Solicitor is a subjective justification that fails to meet the objective standard established by the Supreme Court of the United States in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1980). The opinion letter is deficient in that it does not address constitutional issues, but merely reviews the Pennsylvania statutory scheme as applied to the deputies. The letter has absolutely no application to the Respondent Beaujon who was

an emergency medical technician.

The Petitioner's argument that the deputy position is a confidential position is a gross mistatement of the facts as presented to the Trial and Appellate Courts. All parties agreed to the ministerial nature of the duties of the deputies.

The appeal of Sheriff Roberts was premature under the rationale of the Third Circuit in Prisco v. United States, 851 F.2d 93 (3rd. Cir. 1988), because the order denying his Motion for Summary Judgment was interlocutory inasmuch as the Respondents are seeking injunctive relief in addition to a claim for money damages.

ARGUMENT

I. IT WAS CLEARLY ESTABLISHED PRIOR TO 1986 THAT PUBLIC EMPLOYEES IN THE THIRD CIRCUIT, SUCH AS DEPUTY SHERIFFS, WERE PROTECTED FROM DISMISSAL BECAUSE OF POLITICAL AFFILIATION.

It is well settled law that a government official will be entitled to a qualified immunity from liability for damages only if the alleged conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known at the time the conduct occurred. Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed. 2d 411 (1985); Bennis v. Gable, 823 F.2d 723 (3rd. Cir. 1987). The standard that is applied is an "objective" standard as established in the United States Supreme Court decision of Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1980). In Harlow the Court held that qualified immunity will not be

extended to a public official where it is shown that a clearly established constitutional or statutory right has been violated and that a reasonable person in the public official's position would have known of that right.

In Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Supreme Court opined that a constitutional or statutory right is "clearly established" where it is shown that the right is clear enough that a reasonable official would realize that his action impinged upon that right. In addition, the Court further held that it is not necessary for purposes of denying the qualified immunity defense, that the particular action taken by the public official had been found to be unlawful prior to the incident at issue. The Supreme Court explained what is meant by a "clearly established right":

"The contours of the right must be

> sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 107 S.Ct. at 3039.

The Third Circuit Court, quoting the above stated language of the this Honorable Court, opined in Stoneking v. Bradford Area School District, (Stoneking I) 856 F.2d 594 (3rd Cir. 1988), vacated, 489 U.S. 1062, 109 S.Ct. 1333, 103 L.Ed.2d 804, that Anderson supported the Third Circuit's previous interpretation that "clearly established" requires "some but not precise factual correspondence [between the relevant precedents and the conduct at issue] and demanding that officials apply general, well developed legal principals". 856 F.2d at ____, citing: People of Three Mile Island v.

Nuclear Regulatory Commissioners, 747 F.2d 139 (3rd Cir. 1984). In Stoneking II, 882 F.2d 720 (3rd Cir. 1989) cert.den. 110 S.Ct. 840 the Court reiterated the above position stating:

> We expect officials to "apply general, well-developed legal principles." People of Three Mile Island, 747 F.2d at 144. We have explained that we have "adopted a broad view of what constitutes an established right of which a reasonable person would have known." Sourbeer v. Robinson, 791 F.2d 1094, 1103 (3rd Cir. 1986), cert. denied. 463 U.S. 1032, 97 L.Ed.2d 779, 107 S.Ct. 3276 (1987), which requires us to undertake "an inquiry into the general legal principles governing analogous factual situations, if any, and a subsequent determination whether the official should have related this established law to the instant situation." Hicks v. Feeney, 770 F.2d 375, 380 (3rd Cir. 1985).

882 F.2d at 726

In the present case, the Petitioners argue that the terminated employees rights to be free from political firings was not clearly

established at the time of their terminations because the County Sheriff had the power under the Pennsylvania County Code, 16 P.S. §1203 and 1205, to revoke the appointment of a Deputy who serves at the pleasure of the Sheriff. The Petitioners also argue that the right was not clearly established because the newly elected Sheriff, Jay Roberts, had requested and received a legal opinion from County Attorney Alex Echard which stated that a Sheriff has the authority to terminate or revoke the appointment of a Deputy under the above stated sections of the County Code. Both arguments are specious.

With regard to the statutory authority of the County Sheriff to revoke a Deputy's appointment "at pleasure," the Petitioners cannot possibly argue that the statutory language authorizes the County, the Sheriff and the Commissioners to terminate these employees for an unlawful reason. Even in Pennsylvania, where "at-will" employment is

still recognized, it has been long established that violations of constitutional rights and/or public policy cannot constitute a proper basis on which to terminate even an at-will employee. Geary v. U.S. Steel, 456 Pa. 171, 319 A.2d 174 (1974). That concept is clearly established in many varied areas of employment law. For instance, an at-will employee who serves at the pleasure of his or her master can be terminated for no reason or for any lawful reason, but cannot be terminated for an unlawful reason such as the employee's race, sex, age or religious background. In addition, violations of public policy will not shield an employer from liability such as in instances when an employee is terminated for serving jury duty, or in retaliation for filing a workers compensation claim. See: Rettinger v. American Can Co., 574 F. Supp. 306 (M.D. Pa. 1983); Harrison v. Fred S. James, P.A., Inc., 558 F. Supp. 438 (E.D. Pa. 1983).

Pennsylvania law also limits an employer's authority to terminate an at-will employee when there is specific intent of the employer to harm the employee. Frymire v. Paine Webber, Inc., 107 B.R. 506 (E.D. Pa. 1989).

In Pennsylvania, certain classifications of Counties such as Cambria County are not governed by statutory provisions requiring just cause or economic necessity prior to dismissal of a deputy. This is in contrast to the protections afforded municipal police officers and other state and local employees protected by Civil Service laws. The authority of the County, through its Sheriff, to terminate the employment of its deputy Sheriffs is not unfettered. The distinction to be drawn between Sections 1203 and 1205 of the County Code and analogous provisions of the various Municipal Codes in the Commonwealth applicable to police (i.e. the Borough Code, 53 P.S. §45101 et seq., and the First and Second Class

Township Codes 53 P.S. §55101 et seq. and 53 P.S. §65101 et seq. respectively) is that the latter statutory provisions specifically provide for dismissal of police only for just cause or a reduction in the work force for economic reasons. A County need not show just cause to terminate a Deputy, however, it cannot terminate the employee for unlawful and/or discriminatory reasons as previously stated, nor can one of the municipalities above referenced. In that regard, County deputies and municipal police officers must be treated identically notwithstanding the presence or absence of just cause.

In the present case, it is beyond cavil in the Third Circuit that as of 1982 "the law was 'clearly established' that a public employee could not be demoted in retaliation for exercising his rights under the First Amendment". Bennis v. Gable, supra at 733. In Bennis v. Gable, the Third Circuit specifically held that the illegality of

political patronage firings or retaliatory action against employees for exercising First Amendment rights was clearly established as of 1982. In that case, two demoted police officers brought a civil rights action against the Mayor, the Chief of Police, and the City of Allentown alleging that the demotions were in retaliation for their support of the Mayor's opponent in the 1977 and 1981 mayoral election. The Defendants in Bennis had attempted to argue that even though retaliatory patronage dismissals were clearly established at the time of the employment decision, it was not clear whether demotions for political reasons were permissible. The Circuit Court rejected that argument reasoning that strict factual identity with prior Court decisions is not necessary for the Court to find that analogous conduct has been clearly established as forbidden conduct. In Bennis, the Court relied on its 1984 decision in People of Three Mile Island v. Nuclear

Regulatory Commissioners, supra, which requires some but not precise factual correspondence, and which demands that officials apply general, well developed legal principals:

> While we cannot expect executive officials to anticipate the evolution of constitutional law, neither can we be faithful to the purposes of immunity by permitting such officials one liability-free violation of a constitutional or statutory requirement . . .

Bennis v. Gable, supra at 733.

Applying that rationale to the instant case, there is a correlation between the Third Circuit's pronouncement in Bennis v. Gable, supra, and the instant case, notwithstanding the statutory language of the County Code on which the Petitioners rely. As of 1982, a reasonable public official in the Third Circuit knows that a public employee cannot be subjected to retaliation, be it termination or demotion, for exercising First

Amendment rights.

The Petitioners site in their Petition the recent Seventh Circuit decision in Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991), in support of their argument that the termination of a Deputy Sheriff for political reasons was not clearly established as being unlawful at the time of the firings of the instant employees in 1986. The Seventh Circuit's decision can be factually distinguished from the present case and the Third Circuit Court's position regarding political patronage employment decisions in Bennis v. Gable. In Upton the Seventh Circuit reasoned that the law is unsettled as to whether partisan political affiliation is a proper job requirement for Deputy Sheriffs. The Court pointed to conflicting treatment by the Federal Courts in attempting to apply the principles established by the Supreme Court in Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and Branti v. Finkel,

445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). The Seventh Circuit reached a different conclusion when it applied the Elrod/Branti standard to the facts of that case. It concluded, without much explanation, that the deputies in that case, in the State of Illinois, exercised such "wide latitude and discretion in the performance of their duties and in the implementation of department goals" so as to rise to the level of creating policy, thus making them policy makers which would, according to that court, necessitate a common political affiliation in the department. The Seventh Circuit's view of the function of a deputy is fact specific to Illinois. In addition, the Seventh Circuit assumes in its analysis of the case law that the role and function of a deputy is the same in every jurisdiction. This is not the case. Deputies in the Commonwealth of Pennsylvania perform different functions depending on the County in which the department is located. In some

counties, such as Cambria County, the deputies do little more than serve court papers and provide security within the courtroom. In fact, Judge Sloviter noted in her opinion in the instant appeal to the Third Circuit that the parties had agreed that the deputies in Cambria County performed ministerial duties only, such as service of process, transporting prisoners, and courtroom security. In other counties such as Allegheny County the deputies exercise arrest powers and cooperate with state and local law enforcement officers in the apprehension of fugitives and criminal suspects. Thus, some deputies in Pennsylvania exercise very little discretion in the exercise of their duties while others are expected to make decisions similar to those of other law enforcement officers. In either instance, however, the discretion that is exercised by deputies, like that of the municipal police officers in Bennis v. Gable, supra, does not rise to the level of

"creating" policy. A deputy or municipal police officer is trained in the techniques to be used in the performance of his or her duties, and the political affiliation of the employee does not impact on the ability of the individual to do the job.

The Third Circuit has taken an enlightened approach, applying the rule established in Elrod/Branti as a general, well developed legal principal that a reasonable politician must know as of 1982 that a demotion or termination of an employee in retaliation for his political speech and/or associations is impermissible.

II. THE DISMISSAL OF THE RESPONDENTS BY THE PETITIONERS, AND THEIR RELIANCE ON THE LETTER OF THE COUNTY ATTORNEY, WERE NOT OBJECTIVELY REASONABLE.

The Petitioners also rely in their Petition on the fact that Attorney Alex Echard, county solicitor and labor advisor, issued an opinion relative to the termination

of Deputy Sheriffs. Their reliance is unreasonable and without basis for two reasons: (1) The opinion of Mr. Echard is incomplete in its consideration because it fails to address those situations, whether the employees are "at-will" or otherwise, which constitute an unlawful termination because of a violation of constitutional rights, statutory rights or public policy, Elrod v. Burns and Branti v. Finkel, supra; and (2) The subjective belief or actual knowledge of the government official is no longer a proper consideration under the "objective test" established by the United States Supreme Court, Harlow v. Fitzgerald, supra.

With regard to the first, the opinion letter of Mr. Echard dated November 22, 1985 makes no mention of the Elrod/Branti analysis, nor does it discuss any of the possible constitutional protections which shield public employees from unlawful retaliation for exercising guaranteed rights.

The opinion does not go beyond the mere language of the County Code, failing to take into consideration the extensive treatment given such issues by the federal and state courts. The Petitioners cannot possibly have relied on the Echard opinion for the purpose argued in the Petition.

With regard to the second, the Petitioners have maintained before the district and appellate courts the untenable position that Sheriff Roberts' reliance on the "opinion" of Mr. Echard absolved him and the other defendants from liability for violating the Respondents' constitutionally protected rights. As previoulsy stated, however, the standard which was developed by this Court in Harlow v. Fitzgerald is an objective standard, viewed in light of a reasonable person in the public official's position. The subjective knowledge or political prowess of the individual does not and should not control. If the County and its government officials are

permitted to shield themselves from liability for unlawful activity simply by securing a legal opinion from its Solicitor purportedly authorizing the unlawful act, public employers would have the ability to ignore constitutional and statutory rights with impunity. The legal opinion of Mr. Echard, which does not address the political patronage issue, and which is devoid of any analysis as to the violation of constitutional rights, does not shield the government officials from liability even though that may have been its intent.

III. THE DEPUTY POSITION IS NOT CONFIDENTIAL SO AS TO MAKE PARTY AFFILIATION A REQUIREMENT OF THE POSITION.

The Petitioners argument that the Pennsylvania Legislature's decision to allow a sheriff to appoint or revoke an appointment at will "implies" that the deputy position is confidential is without any basis in the

record before either the District or Appellate Court, and is a blatant misrepresentation of the facts. The Opinion of Chief Circuit Judge Sloviter clearly states:

> All counsel in their briefs and during oral argument agreed that deputy sheriffs in the Cambria County Sheriff's office primarily perform three tasks: they serve process; they transport prisoners to and from court and between facilities; and they provide security in courtrooms.
>
> * * *
>
> We cannot say as a matter of law that party affiliation would further the effective performance of these tasks. In Elrod, one of the plaintiffs was the chief deputy of the process division, presumably more of a policymaking position than one who simply serves process, and he was held entitled to First Amendment protection. (Citation omitted). The defendants have offered no reason why the political alignment between the deputy and the sheriff is relevant to the deputies' duties in serving process, transporting prisoners, or guarding courtrooms.

Petitioner's Appendix A, p. 17a.

There is absolutely no basis for the Petitioners' averment that deputies in Cambria County "necessarily have access to confidential communications and records," when

in fact the opposite is true.

IV. THE DENIAL OF SHERIFF ROBERTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS OF QUALIFIED IMMUNITY WAS INTERLOCUTORY AND NOT IMMEDIATELY APPEALABLE.

In Prisco v. United States, 851 F.2d 93 (3rd. Cir. 1988), the Third Circuit Court dismissed the interlocutory appeals of Defendants Edwin Meese and Stanley Morris who sought review of the District Court's denial of their Motions for Summary Judgment on the basis of qualified immunity. The Plaintiffs in Prisco were seeking declaratory and injunctive relief, as well as monetary damages, in their action against the United States and against William French Smith, Edwin Meese and Stanley Morris, individually and in their official capacities, with regard to the placement of a minor child into the Federal Witness Protection Program. The individual Defendants filed Motions for Summary Judgment claiming qualified immunity and failure by the

Plaintiffs to allege actions on the part of the Defendants which violated the Plaintiffs' rights. The Third Circuit, analyzing the appealability of the qualified immunity issue, held that the immunity defense is not applicable to claims seeking prospective relief, i.e. declaratory and injunctive relief. The Court reasoned that the underlying purpose of providing immunity to public officials is to shield the official from suits for damages which would otherwise have a disruptive effect on the official's exercise of discretion. Public officials would be less inclined to make decisions and take official action if subject to a persistent threat of monetary damage when performing discretionary functions. The purpose of the qualified immunity is <u>not</u> to allow public officials to violate rights with impunity, but rather, to minimize any chilling effect on the public official with regard to fulfilling official duties. As noted by Chief

Judge Gibbons, the policy rationale for qualified immunity "is that we do not want officials to make discretionary decisions with one wary eye on their pocket book". 851 F.2d at _____.

The Court went on to consider whether the underlying rationale for qualified immunity has any applicability to a law suit involving a prayer for injunctive relief. Judge Gibbons held that the party against whom an action for prospective relief is pending cannot appeal from the denial of a Motion for Summary Judgment on immunity grounds. He reasoned that an official acting in violation of the law, although shielded from the threat of money damages by virtue of qualified immunity, cannot continue to act in an illegal manner causing a further and continued deprivation of rights. Even if the Court were to determine that qualified immunity was applicable, the underlying question of whether statutory or constitutional rights have been

violated remains unanswered. A Plaintiff may well be entitled to injunctive relief even though the public official can prove that the conduct which is the subject of the claim did not violate clearly established law, and is thus shielded from liability for money damages. As a result, the litigation must go forward without interruption by an interlocutory review of the qualified immunity issue.

In the present case, the Respondents have requested in their complaint that the court award injunctive relief by reinstating the Respondents to their positions with the County, and in directing the Petitioners to cease and desist any further retaliatory actions against the Respondents. Throughout the course of this action, the Petitioners have taken every opportunity to delay final resolution of the Respondents' claims, using the passage of time to further disadvantage the Respondents thus causing a continued

deprivation of rights. The eleventh hour appeal, just five (5) days prior to the date of trial, has caused undue hardship on the Respondents who are without the economic wherewithall to pursue their claims.

Applying the Third Circuit's rationale in Prisco, the appeal of Jay Roberts was properly dismissed on jurisdictional grounds because claims for prospective relief are still pending against him and the municipal defendants. There is no reason to further delay resolution of the Respondents' claims that they are entitled to be reinstated to those positions from which they were unlawfully removed. The interlocutory review of the qualified immunity issue only stands to further prejudice the Respondents.

CONCLUSION

Based on the arguments and authorities cited herein, the Respondents,

Mutsko, Beaujon, Plummer and Ardini, request that the Petition for Writ of Certiorari be denied and the matter remanded to the District Court for trial.

RESPECTFULLY SUBMITTED,
Martin G. Holleran
Counsel for Respondents